

**“STREAMLINING REGULATORY AND COMPETITION APPEALS”
(GOVERNMENT CONSULTATION OF 19 JUNE 2013)**

RESPONSE OF THE COMPETITION APPEAL TRIBUNAL

INTRODUCTION AND SUMMARY

1. The Competition Appeal Tribunal (“CAT”) is central to this review. Not only is it one of the main appeal bodies discussed in the Consultation,¹ but its central role going forward is acknowledged both in the Consultation itself² and in the recently published draft Consumer Rights Bill, which is intended to enhance the opportunities for private enforcement of competition law.³
2. The CAT appears in the list of those consulted by the Department for Business, Innovation and Skills (“BIS”)⁴ and has provided BIS with advice and information, some of which is reflected in the Consultation. However, the CAT made it clear that it might feel obliged to provide a detailed response to the Consultation, as it has concerns about some aspects of the document.
3. Our comments are subject to certain constraints. The CAT is a specialist tribunal, and part of the court system. Although it is sponsored by BIS, its President and Chairmen are judges appointed by the Lord Chancellor. The CAT is at the same time closely involved in and necessarily detached from the regulatory and competition systems. As a court, the CAT expresses no view on questions of policy, which are matters for Ministers, or the relevant economic regulators. It is, however, well placed to comment on its experience of handling appeals from various authorities, and based on this experience and specialised knowledge, to comment on the practical merits and demerits of the BIS proposals as well as on the information and data on which BIS seeks to rely.
4. Subject to these important qualifications, we set out our views in this Response. Broadly, we welcome some aspects of the Consultation, we disagree with other aspects and we have some serious underlying concerns. In particular:
 - (1) We recognise that some rationalisation of the various arrangements for appeals from sectoral regulators could be useful and we welcome a number of the proposals, including the introduction of legislation to enable the heads of the three judiciaries of the United Kingdom to nominate specific judges of the High Court (and equivalent in Scotland and

¹ “Streamlining Regulatory and Competition Appeals: Consultation on Options for Reform”, 19 June 2013.

² Consultation, Chapter 5 and in particular paras 5.7-5.16.

³ Draft Consumer Rights Bill (June 2013).

⁴ Consultation, Annex K.

Northern Ireland) to sit as CAT Chairmen, and to remove the current 8 year limit on eligibility to sit as Chairmen.

- (2) We believe that a possible basis for rationalisation of regulatory appeals would be to allocate complex price control appeals directly to the Competition Commission (“CC”) / Competition Markets Authority (“CMA”), whilst reserving other matters (including any further judicial review of a CC/CMA price determination) to the CAT. However, any rationalisation would need careful design as: (1) the CC’s procedures hitherto have been very different from those of the CAT; (2) how the CMA will handle regulatory cases has still to be settled; and (3) the potential for interaction between price control and non-price control issues needs to be appreciated.⁵
- (3) We agree that some improvements could be made to the specific regime for appeals under the Communications Act 2003 (particularly by routing price control matters directly to the CC/CMA as above), but believe that other difficulties with the regime have been over-stated and/or misunderstood.
- (4) We agree that in the specific context of regulatory appeals a specialist tribunal (ie the CAT) has significant advantages over the general court system in terms of speed, focus and expertise, and that further improvements to processes can always be made.
- (5) We note the Government’s views on the “standard of review” in regulatory appeals generally (which permeate much of the Consultation) but it is questionable whether changing (or reformulating) the standard of review will bring the benefits sought. In particular, there seems to be a degree of misunderstanding and misinformation about how “merits” appeals work in Communications Act 2003 cases and what would be the likely effects of changing them. Changing the standard of review is unlikely to prove itself a “silver bullet”, as the Government appears to believe it to be.
- (6) No case at all is made out in the Consultation for altering or reformulating the standard of review in competition appeals under the Competition Act 1998, whether from decisions of the Office of Fair Trading (“OFT”) / CMA or from regulators with concurrent powers. The Consultation contains little, if any, analysis of the competition system; it appears not to appreciate the significance of current expectations and developments at European level in relation to appeals in competition cases; and it threatens to undermine a key element of the Government’s current reform of the competition system.

⁵ See Part I, para 36 and Part II, para 67 below.

- (7) We agree that appeals should be conducted as quickly as is reasonably possible, consistently with the requirements of justice, and should not be concerned with immaterial matters. However, we do not share the Government's apparent view that current CAT rules and procedures encourage unmeritorious appeals or involve the excessive deployment of so-called "new" evidence. We do not believe that placing specific restrictions upon the admission of such "new" evidence, or upon CAT timetables or other procedures is either necessary or sensible. Similarly we believe that the introduction of a costs rule whereby a successful appellant would not normally benefit from an order for costs in the absence of unreasonable conduct on the part of the regulator/authority, whereas a successful regulator/authority would normally benefit from such an order, would be asymmetrical, unfair and at odds with the well-established approach in similar public law cases.
- (8) We are concerned that the Government's stated objectives are too high-level in nature and are in some cases contradictory. Where they are clear, we fear that implementation of some proposals (for example changing the standard of review or over-prescribing the procedures of the CAT) may achieve the opposite result from what is intended, namely delay and increased cost.
- (9) We are concerned that some of the evidence relied on in the Consultation to support often radical conclusions and proposals is insufficient, selective and/or misleading. Statistics on relative times for different appeal processes and superficial comparisons between processes of very different natures are particularly suspect in this regard. Overall, the figures quoted in the Consultation show a low number of appeals involving only a small percentage of decisions taken, with the CAT dealing with most cases with commendable dispatch. We are also concerned at the use of selected quotations from judges in cases which, on closer examination, were decided in the opposite sense from that implied⁶ and the general use of assertions unsupported by evidence as a basis for proposals for change. We would strongly encourage the Government to test its assertions and proposals against hard evidence, rather than to rely on special pleading and anecdote.
- (10) We are concerned that the Consultation takes too little account of the findings in other recent reviews covering some of the same ground, in particular on the institutional reform of the competition system, the encouragement of private competition actions and the implementation of the revised EU communications framework, which confirm the value of a specialist tribunal and set out the appropriate standard of review in regulatory and competition appeals.

⁶ See, in particular, Part II, para 42 below.

- (11) We are concerned that the degree of control that BIS appears to envisage exercising over the detailed conduct of the CAT's activities and procedures is too prescriptive and risks infringing the principle of judicial independence, as well as adversely affecting the just and expeditious disposal of appeals.
- (12) In short, we fear that whilst there are some very positive aspects to these proposals, overall the Consultation has not presented a coherent case for change and some of its measures, if implemented, could harm the system.
5. In **Part I** of this Response, we set out some comments of principle on the main matters raised in the Consultation. These comments follow the order in which they are set out in the Consultation. In **Part II**, we respond to the specific questions in Chapter 8 and provide more detailed comments. Certain comments in relation to the Consultation annexes are included at the end of Part II.

PART I: COMMENTS ON MATTERS OF PRINCIPLE RAISED IN THE CONSULTATION

1. Our comments on matters of principle focus on:
 - the case for change and the Government’s stated objectives;
 - the standard of review in Communications Act 2003 cases and in competition appeals;
 - appeal bodies and routes of appeal;
 - unmeritorious appeals and so called “new evidence”;
 - the appeal process and “streamlining”; and
 - access to justice and judicial independence.

Our general concern with the evidence and data described in the Consultation, and the use made of them, is mainly discussed in **Part II** of this Response.

THE CASE FOR CHANGE AND THE GOVERNMENT’S OBJECTIVES

2. The Government’s case for change is set out in Chapter 3 of the Consultation.⁷ Essentially this is that (1) regulatory appeals have evolved differently across different sectors; (2) in the communications sector there seem to be strong incentives for parties to appeal, either because the standard of review is too intensive or because parties face no “downside”, even if they lose; and (3) in other sectors there are many fewer appeals, despite the possibility for such appeals existing. The Government suggests it would be better to move to a system where appeals were more focused on “material” errors, appeal bodies’ expertise was applied consistently across the sectors, appeals were more accessible to all, incentives were properly aligned and processes were as efficient and cheap as possible.
3. In assessing whether this case for change is made out it is useful to look at the Government’s stated objectives in conducting this exercise, which are set out in the Executive Summary.⁸ These seem to us to be rather high-level in nature and to show a degree of confusion and contradiction. Even where the objectives are clear, there is a danger that implementing some of the Government’s proposals would achieve the opposite result from what was intended.

⁷ Consultation, page 18.

⁸ Consultation, page 5.

4. The **first objective** set by the Government for the appeal system is to “support independent, robust, predictable decision making, minimising uncertainty”.
5. We assume that this refers to decision making by regulators rather than by appeal courts themselves, but it is important to note that it omits the requirement that decisions should be soundly based on the evidence. It is perfectly possible for decisions to be robust but wrong: indeed the two often go together. It is trite to say that the underlying purpose of an appeal system is to encourage good decision making; however, this involves not only upholding regulatory decisions when they are sound, but also by correcting decisions when they are wrong or badly made and it is that necessary process of correction that gives rise to the issues of weight and degree of review that the Consultation seeks to address. So while this objective may sound superficially attractive, it begs the essential question of what makes an effective appeal system.
6. The **second objective** is to “provide proportionate regulatory accountability” – correcting errors, providing justice to parties but allowing regulators to “set a clear direction over time”. Again, this objective is fair so far as it goes, but it hides some contradictions. If, for example, a regulator’s “direction over time” were profoundly mistaken, based perhaps on an idiosyncratic economic theory, an effective appeal system would have to cope with this too, if necessary by correction. There is an important debate to be had on what is the correct delineation of the discretion to be allowed to regulators, in terms of policy or judgment, but unfortunately this objective is expressed in too general terms to assist in that debate. At present, however, it is important to stress that the existing system *does* allow regulators to set a clear direction.⁹
7. The **third objective** is to “minimise the end-to-end length and cost of decision making, through streamlining appeals and encouraging quicker decision making by regulators”. It is quite right to worry about the overall length of a regulatory case, but the Consultation itself focuses largely on the appeal process before the CAT. The proposals to improve evidence handling and decision making by regulators and for them to interrogate individuals,¹⁰ although no doubt useful in themselves, are much less significant than the changes proposed for appeals. Here it is assumed that by limiting the admission of “new” evidence on appeal and by reducing the duration and intensity of judicial scrutiny, quicker and cheaper regulatory decisions will result. It is very doubtful that this will occur; some of the proposed changes will, if anything, increase the likelihood of litigation, and reducing the level of scrutiny will tend to lower the incentives for regulators to make sound decisions.

⁹ See, further, Part II, paras 11-14 below.

¹⁰ Consultation, para 6.29ff.

8. The **fourth objective** is to “ensure access to justice” for small, as well as large, firms. This is something to be supported wholeheartedly, but unfortunately there is very little in the Consultation itself that deals with it.¹¹ The proposals for “fast tracking” cases (already available in practice in the CAT) are likely to be outweighed by the proposal to create an imbalance in favour of the regulator in costs awards,¹² which could be a considerable disincentive to appeals by smaller firms. And it is hard to see, as a matter of principle, how lowering the standard of review can increase access to justice.
9. The **fifth objective** is to “provide consistency...between appeal routes in different sectors” (whilst acknowledging the different sectoral characteristics). We agree that there are significant, and anomalous, differences between the appeal regimes in different sectors, and we welcome the general objective of bringing about some rationalisation. However, we are not optimistic that the Consultation provides a sufficient basis for doing this. This is at least in part because the Consultation concentrates on the communications sector and treats other regulated sectors comparatively cursorily.
10. Generally, we sense from the tone of the Consultation and from the accompanying press release¹³ that the Government’s real objective is rather more mundane, namely to lighten the appeal burden for business and for regulators. Worthy though this objective may sound, it is not easily achievable as the interests of these two “stakeholder” groups can differ sharply.¹⁴ Businesses tend to suffer as much if not more from bad regulatory decisions as from bad appeal processes. Appeals help to put the former right. Reducing the scope and intensity of appeal scrutiny may lighten the burden on regulators, but by lowering the incentives on regulators to get their decisions right, it will increase the burdens on business. The Consultation appears to have assumed, wrongly, that any issues to be corrected lie entirely within the appeal system, and has (despite paying lip service to the need for it) paid less attention to how regulatory decisions are made in the first place.

¹¹ The recent draft Consumer Rights Bill is perhaps more relevant to this topic.

¹² Consultation, para 6.22.

¹³ “A new streamlined system will mean that businesses see their appeals sorted out quicker (sic) and that they and regulators spend less time and legal resources on disputes”.

¹⁴ The Impact Assessment accompanying the Consultation highlights that the costs of the present appeal system fall most heavily on appellants and interveners (a total of £16.9 million compared with £4.93 million incurred by regulators and appeal bodies – see page 4). Yet paragraph 14 of the Impact Assessment reveals that the only evidence gathered by BIS as part of its preliminary analysis is “from regulators and appeals [sic] bodies”.

THE STANDARD OF REVIEW

11. Discussion about the significance of the standard of review in appeals appears in Chapter 4 of the Consultation.¹⁵ In seeking to make a case for change, the Government claims that it is this that determines the length and complexity of cases; that in the communications sector (where the standard of review is “full merits”) cases are long, complex and wide-ranging; and that the standard of review differs across different sectors. The Government notes that introducing a more limited standard of review for energy sector appeals in Australia led to more appeals and higher prices, but believes this was because the consumer interest was in some way neglected rather than because of the change to the standard of review itself. The Government claims it can avoid that risk in the UK context.¹⁶
12. It is clear that the Government believes it is the prevalence of the “full merits” standard of review that contributes in large part to the length and complexity of appeals, and that lowering it offers some kind of “silver bullet” solution.¹⁷ The Consultation explains this in terms of a “full merits” standard allowing consideration of all aspects of the decision under appeal, including whether it is “right”, with the court able to substitute its own view, contrasted with a more limited “judicial review” standard where the review is limited to matters of legality, fairness and rationality, with quashing and remittal as the remedies.¹⁸ The Government’s view appears to be that “appeals should focus on identifying material errors or unreasonableness in regulatory decisions, rather than providing for a second body to reach its own regulatory judgment”.¹⁹ As a solution to this problem, the Government proposes the general adoption of a judicial review standard, in the interests of economy of process, but where a case can be made for a more intensive standard of review, this should be on specific or what might be termed “pixelated” grounds only.²⁰ The Consultation looks at how this might operate in Communications Act 2003 cases, in competition appeals and in certain other cases. The comments below refer to Communications Act 2003 appeals and other cases; we deal with competition appeals in the next section.
13. There are several grounds for questioning this proposed solution. First, it is not clear that length and complexity of appeals are as closely linked to the standard of review as the Government

¹⁵ Consultation, page 27.

¹⁶ See Consultation, para 4.14.

¹⁷ “The standard of review will have a significant impact on the scope of the appeal body to re-examine a decision, the length and cost of an appeal” (Consultation, para 3.13) and “The standard of review...will have a material impact on the level of scrutiny applied, and the length and cost of an appeal” (Consultation, para 4.6).

¹⁸ Consultation, paras 2.15-2.20.

¹⁹ Consultation, para 4.18.

²⁰ Consultation, Part 4, in particular paras 4.16-4.21.

appears to think. Second, the merits appeals conducted by the CAT have emphatically *not* been in the nature of complete re-trials with a “second body reaching its own regulatory judgment”.²¹ Third, on occasions the CAT’s examination of a regulator’s findings and assessments in the context of a merits appeal has revealed serious errors which might have gone uncorrected on a more restricted review. Finally, changing the standard of review is bound to lead to uncertainty, delay and further litigation for a period (which may in fact last for quite a long time, as the implications of legislative changes are worked out in the courts).

14. On the first ground, the Government’s view appears to be based on a misunderstanding of what dictates the intensity of review on appeal and the length of cases. Put simply, one can have “light” full merits review and “heavy” judicial review. Indeed, in judicial review cases, the need to remit a case to the regulator for a fresh decision (which may itself be appealed) extends the overall time (“end-to-end” in the Government’s words) that a case takes and it is at least open to question whether, taken overall, judicial review cases are shorter.²²
15. Not only is the difference in intensity and length between the two standards over-stated, but applying a full merits standard may enable a decision that would be struck down on judicial review to be salvaged.²³ This was, of course, precisely the reason why Article 4 of the Directive on a common regulatory framework for electronic communications networks and services (the “Framework Directive”) requires a consideration of the merits of the case on appeal and it is somewhat ironic that the Government now contemplates a reversal of this.²⁴
16. Finally, the Consultation does not contain any convincing example where the use of an intensive standard of review has led to undue delay and complexity. In the example quoted of *British Telecommunications Plc v OFCOM (Partial Private Circuits)*,²⁵ the delays arose from other factors, including the hearing and disposal of two “gateway” preliminary issues, the availability of the parties, and an appeal to the Court of Appeal.

²¹ See further Part II, paras 11-14 below.

²² See the commentary on the statistical basis for the Government’s claim to the contrary in Part II, para 4(2) below; paradoxically, in “full merits” appeals under the Communications Act 2003, the CAT technically speaking remits the decision to OFCOM, but with directions on what needs to be done, and OFCOM is normally able to take a fresh decision very quickly. The cost / benefit analysis within the Impact Assessment in connection with “Option 2” assumes that consumers will “benefit from faster appeals as they will be able to receive the benefits of regulation sooner”. However, there is no acknowledgement of the additional costs likely to be incurred upon the quashing of a regulatory decision on judicial review grounds.

²³ See eg *TalkTalk Telecom Group v OFCOM* [2012] CAT 1 at [136(g)], where it was held that hearing the case on its merits could cure an otherwise fatal procedural defect in the original decision. See further Part II, paras 7 to 9 below.

²⁴ See the Report by CERRE “Enforcement and Judicial Review of National Regulatory Authorities” (Brussels 21 April 2011) cited in the Consultation in a different context, page 125. See also Part II, para 7 below.

²⁵ See Consultation, para 4.7 and the fuller discussion of this point in Part II, para 4(3) below.

17. As to the second ground, under its current practice the CAT does not conduct a *de novo* re-trial of the regulator’s decision but limits itself to establishing whether the grounds of appeal reveal material errors by the regulator.²⁶ For example, as the CAT itself has said:

“What is intended is the very reverse of a *de novo* hearing. OFCOM’s decision is reviewed through the prism of the specific errors that are alleged by the appellant. Where no errors are pleaded, the decision to that extent will not be the subject of specific review. What is intended is an appeal on specific points”.²⁷

18. Nor are the Government’s concerns about regulatory uncertainty and damage to the credibility of regulators justified. The Consultation refers to this arising from “a concern that the appeal body could act as a second regulator ‘waiting in the wings’”.²⁸ This appears to be a reference to words used by Lord Justice Jacob²⁹ in describing what *ought not* to happen, rather than what *does* happen (see further Part II, paragraphs 14 and 42 below). There is no evidence whatsoever in the Consultation of the CAT seeking to act in this way and this particular concern has no basis in reality.

19. On the third ground, it is the case that on some (relatively rare) occasions, an appeal in which the merits of a decision have been challenged reveals serious errors of fact in the assessment by the regulator concerned. This is expressly acknowledged in the Consultation³⁰ and the most recent example is the CAT’s decision in the *Pay TV* case.³¹ It is not clear whether the contemplated reformulation of the standard of review so as to create pixelated grounds of appeal would be sufficient to cover such cases. If not, there would be a clear miscarriage of justice as and when such cases arise in the future.

20. On the fourth ground, the Consultation seems sanguine as to the extent of disruption and delay that would inevitably follow from legislating to change the standard or grounds of review in a regime set by EU law. However, moving away from a full merits standard to something more restrictive is at least likely to generate additional and/or lengthier litigation as parties seek to establish the boundaries of the new regime,³² including whether it complies with Article 4 of the

²⁶ Although the Consultation refers to the need to impose a requirement of materiality, the CAT would not overturn a regulator’s decision because of something that was not “material” (see Part II, para 35 below).

²⁷ *British Telecommunications Plc v OFCOM* [2010] CAT 17. Other examples are given in Part II, para 14 below.

²⁸ Consultation, paras 3.18 and 5.4 (footnote 31).

²⁹ *T-Mobile (UK) Limited v OFCOM (Termination Rate Disputes)* [2008] EWCA Civ 1373 at [31].

³⁰ See Consultation, para 3.1 “several recent appeals have demonstrated that regulators have made clear factual errors” and the cases mentioned in Part II, footnote 110 below.

³¹ Cases 1156-1159/8/3/10 *British Sky Broadcasting Limited & Ors v OFCOM* [2012] CAT 20. This case is cited in the Consultation at para 7.16 (albeit wrongly cited as the satellite “Conditional Access Modules” appeal) as an example of a case involving large amounts of evidence and witnesses.

³² See, for example, H Davies QC, *Competition Litigation: Practical Thoughts in Developing Times* [2011] Comp Law 274, where the author observes, in relation to the current appeals regime: “Recent experience at the

Framework Directive. The latter issue may ultimately have to be tested through a reference to the CJEU under Article 267 TFEU, with the risk that other appeals would be brought to a standstill during the reference period (which can take a number of years to complete). It is indeed quite foreseeable that there may need to be more than one reference to the CJEU on different questions relating to the application of the new standard. The Government states that long term benefits would outweigh the short term uncertainty.³³ Such a view sits rather unhappily in a set of proposals designed to promote economy and speed of process, and does not take due account of the disruption that could be caused to the development of fast moving important markets and the chilling effect on innovation, to the detriment of the national economic interest.

21. Finally, there is no mention in the Consultation of the almost universally unfavourable reaction to the two earlier extensive consultations on changing the standard of review in communications appeals.³⁴
22. Subject to the requirements of Article 4, it is of course ultimately a matter for Government, subject to the wishes of Parliament, to decide what standard of review is to be applied by the CAT in Communications Act 2003 appeals. We considered it appropriate to point out that the assumptions underlying the Government's apparent wish to move to a general judicial review model, or to pixelated grounds of review in certain cases, may be unsafe. Our concerns apply with even greater force to competition appeals, to which we now turn.

COMPETITION APPEALS

23. The Consultation contemplates a weakening of the present "full merits" appeal standard for appeals against *ex post* infringement decisions by competition authorities (including regulators with concurrent competition powers).³⁵ Although three competition decisions are described in Annex E to the Consultation,³⁶ the main part of the Consultation does not discuss the

CAT has also shown that its review jurisdiction has reached a level of maturity at which the key questions of its scope and reach have largely been settled. Most importantly, whereas in the early years of the CAT the question of what constitutes an 'appealable decision' for the purposes of ss 46 and 47 of the Competition Act 1998 was a hot topic of dispute, there have been scarcely any such disputes in recent years."

³³ Consultation, para 4.66. See also the Impact Assessment accompanying the Consultation, which states that the transitional costs of understanding the new regime are "unlikely to be significant" (page 6) and that there will only be a "short-term" increase in the number of appeals if the standard of review is changed and firms "test" the new jurisdiction (pages 5 and 7). At page 18, it is stated that the transition costs (for Option 2) are likely to be low "since the changes to the standard of review are relatively easy to understand, and most of the affected firms are those in regulated sectors who have experienced legal and regulatory teams".

³⁴ DCMS's consultation, "Implementing the revised EU Electronic Communications Framework – Appeals", is referred to at paras 3.31 and 4.26 of the Consultation, but not the responses to it.

³⁵ Consultation, paras 4.46-4.66.

³⁶ *G F Tomlinson, National Grid and Albion Water*. We discuss the contents of Annex E and its curiously selected examples in the more detailed comments at Part II, para 104(4).

competition enforcement system in any detail. In particular, it is entirely silent as to whether the enforcement of competition law has been affected adversely or otherwise by the current standard of review or by the way in which appeals have been conducted. The press release accompanying the Consultation refers to the *Albion Water* case as if it were a typical case, and fails to explain (or even to refer to) the special circumstances of that example of serial, but in the result entirely justified, litigation.³⁷

24. Appeals against *ex post* competition decisions appear to have fallen within the Consultation because regulators exercise competition powers concurrently with the competition authorities, and have to choose whether in any given case they should exercise their competition or their regulatory powers. The choice of power may indeed affect the situation on appeal. But the distinction between competition appeals and regulatory appeals (acknowledged in paragraph 4.46ff of the Consultation) is fundamental for several reasons, and it cannot be assumed that it is appropriate (as proposed by paragraph 4.58 of the Consultation) simply to transpose principles and draft legislation contemplated in connection with communications appeals.
25. First, and perhaps most obvious, is the fact that a finding of infringement of a competition law prohibition is a very serious matter with potentially drastic consequences for the undertaking concerned, and its executives. Such a finding is generally seen as quasi-criminal in nature.³⁸ As such it has serious adverse reputational as well as financial implications. Basic justice requires that, when the finding comes for the first time before an impartial and independent court, a legal challenge based on the merits (including the factual assessment of the decision-maker) should be possible.
26. Second, the relevance of the European Convention on Human Rights (“ECHR”) is recognised in the Consultation.³⁹ No-one questions that competition appeals should comply with Article 6 ECHR, in recognition not only of the substantial penalties but also of the other adverse consequences that a finding of infringement may have for a company. Restricting the grounds on which a company can appeal against such a finding when made by an administrative body acting as investigator, prosecutor and judge, risks violating the fundamental requirements of Article 6. For example, in the case of *Menarini*,⁴⁰ the European Court of Human Rights highlighted the importance, in the context of a review compatible with Article 6, of full judicial

³⁷ *Albion Water* was, for several reasons, a wholly exceptional case. See Part II, para 104(4)(v) below.

³⁸ See *A. Menarini Diagnostics S.R.L. v Italy*, no. 43509/08, 27 September 2011 (ECHR); *Napp Pharmaceutical Holdings Limited v Director General of Fair Trading* [2001] CAT 3 at [69]; *Aberdeen Journals Limited v Director General of Fair Trading* [2002] CAT 4 at [176].

³⁹ Consultation, paras 4.48 et seq.

⁴⁰ Cited at fn 38 above, paras 63-64.

control over all elements of the administrative authority's decision, including matters as to which the authority enjoys a discretion.⁴¹

27. Furthermore, restricting the grounds of appeal would directly conflict with the Government's statement in its Response document of March 2012 in relation to the reform of the competition regime that:

“The Government accepts the strong consensus from the consultation that it would be wrong to reduce parties' rights and, therefore, intends that full-merits appeal would be maintained in any strengthened administrative system”.⁴²

28. The Consultation refers to this statement,⁴³ but does not explain why the Government is having second thoughts so soon. This is unfortunate given that stakeholders may have been willing to embrace aspects of the institutional reform proposals (for example, retention of the administrative decision system, as opposed to moving to a prosecutorial one) in the reasonable expectation that a full merits appeal system would be retained.
29. The Government seeks to draw an analogy with reviews by the General Court of the EU of infringement decisions made by the European Commission, implying that this supports a lowering of the current standard of review. But in doing so it fails to take account of the way in which the EU courts are developing their own appeal procedures to comply with the fundamental requirement of compliance with the ECHR, in the light of widespread and growing concern about the more limited scope which has at times been attributed to the review carried out by the General Court in that context (cf. *KME* and *Chalkor*).⁴⁴ Thus, at a time when pressure for more intense judicial scrutiny within the EU competition regime is increasing, the Government appears to be contemplating the restriction of such scrutiny in the UK system.

⁴¹ See also the views expressed by Marc Jaeger, President of the General Court of the European Union, in relation to the standard of review (at EU level) of cases involving complex economic assessments and the particular requirements of human rights in this context: M Jaeger, “*The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of Marginal Review?*”, *Journal of European Competition Law & Practice*, 2011, Vol 2(4).

⁴² Government's 2012 Response to Consultation, “*Growth, Competition and the Competition Regime*” at page 54.

⁴³ Consultation, para 4.52.

⁴⁴ Case C-272/09 P, *KME Germany & Ors v Commission* [2012] 4 CMLR 275; Case C-386/10 P, *Chalkor AE Epexergasias Metallon v Commission*. This jurisprudence is quoted at para 4.51 of the Consultation but the implications are not examined. See also Merola & Derenne (eds), *The Role of the Court of Justice of the EU in Competition Law Cases*, GCLC Annual Conference Series, Bruylant (2012); I Forrester, “*A Bush in Need of Pruning: the Luxuriant Growth of “Light Judicial Review”*”, *European Competition Law Annual 2009*; *The Evaluation of Evidence and its Judicial Review in Competition Cases*, Hart Publishing, Oxford and Portland Oregon (2011), 407-452; W Wils, “*The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis*”, (2004) 27 (2) *World Competition: Law and Economics Review*, 201, 224. See also Jaeger, cited at fn 41 above.

30. The contemplated changes also appear to create anomalies and inconsistencies in relation to the private enforcement of competition law. Here, a finding of infringement by a competition authority is binding for the purposes of a follow-on action for damages whether in the High Court or the CAT (Competition Act 1998, sections 47A and 58A).⁴⁵ Such damages might well exceed the administrative penalty. If the full merits appeal standard were discarded or restricted, as is now being mooted, a company defending such an action would only have been able to challenge the (binding) finding of infringement on those restricted grounds. By contrast, in a stand-alone private action there would be a full consideration of the merits of the case by an independent and impartial judicial body (and subsequent possibility of appeal to the Court of Appeal).⁴⁶
31. Finally, there is an acknowledgment in the Consultation that a full merits appeal should perhaps remain possible as to the amount of any penalty. This again derives from a similar distinction in EU law.⁴⁷ However, the distinction is difficult to justify. The question has been discussed in the EU context whether it is appropriate to separate the amount of the penalty from the underlying decision finding an infringement on which the penalty is based.⁴⁸ In any event, the point remains that the effects of an infringement decision itself are sufficiently serious to suggest that the availability of a full merits review by an independent and impartial court is essential in the interests of justice, where the decision has been made by an administrative body acting as investigator, prosecutor and judge. This appears to have been recognised by BIS itself as recently as 2012.

APPEAL BODIES AND ROUTES OF APPEAL

32. The Government's proposals for which appeal body should hear which appeal are contained in Chapter 5.⁴⁹ The Government accepts the need for specialist appeal bodies alongside the High Court and its equivalents, but believes appeals are not necessarily being heard by the most appropriate body. A number of potential rationalisation measures are identified, including sending Communications Act 2003 price control cases directly to the CC/CMA rather than routing them through the CAT as at present.

⁴⁵ The same is true of findings of fact by the OFT: section 58 of the Competition Act 1998.

⁴⁶ Such stand alone claims can now be brought in the High Court, and will also be available in the CAT if and when the draft Consumer Rights Bill published on 12 June 2013 becomes law.

⁴⁷ Consultation, para 4.50. Article 31, Regulation (EC) 1/2003.

⁴⁸ See, for example, Gerard D, "Breaking the EU Antitrust Enforcement Deadlock: Re-empowering the Courts?", *European Law Review* Vol. 36, No.4, August 2011, pp.457-479; Norlander K and Harrison P, "Are Rights Finally Becoming Fundamental?", *CPI Antitrust Chronicle*, February 2012(1).

⁴⁹ Consultation, page 48.

33. As regards the need for a specialist appeal body, we note the Government's statement that it "has decided to retain a specialised CAT"⁵⁰ so do not discuss this point further, save to note that the Government recently endorsed the CAT's specialised expertise and capacity in relation to private enforcement.⁵¹ We believe that a specialist appeal tribunal, in the context of regulatory and competition appeals, offers significant advantages over alternative bodies, in terms of flexibility, speed and focus, and the Consultation confirms this view.⁵² In particular, we welcome the proposal to direct judicial reviews of disputed decisions arising *in the course of* Competition Act 1998 investigations to the CAT rather than the Administrative Court, as at present.⁵³
34. As to the choice between the CC/CMA and the CAT, this requires careful consideration. The CC has specific adjudicatory functions, and legal challenges can be brought in respect of such decisions, both interim⁵⁴ and final. These challenges are currently brought either to the High Court or, in the case of merger and market investigation decisions, to the CAT. Up to now the CC has operated these functions in a very different way from the CAT. In merger and market investigations, the CC undertakes a detailed inquisitorial examination of the issues, gathering whatever evidence it feels it needs.⁵⁵ It does not generally hold *inter partes* hearings and its proceedings are not generally open to the public. On the other hand the CAT hears appeals and reviews by way of an adversarial procedure, and on the basis of the evidence and arguments advanced by the parties; it does not normally seek additional evidence. It certainly does not carry out its own investigations. Its proceedings are generally in public. The CAT's decisions are controlled by the Court of Appeal. Precisely how the CMA will handle regulatory appeals, assuming these continue to come to it, is not yet settled. It seems likely that it will in general follow current methods used by the CC.
35. These points suggest that the CAT and the CC/CMA should not be viewed as simple substitutes for one another, and that the CMA's processes would probably be suitable for the handling of complex price control assessments and other similar matters requiring very detailed expert investigation and assessment. By the same token, the Consultation recognises that Energy Code

⁵⁰ Consultation, para 5.9.

⁵¹ Government's 2013 response to Consultation: "*Private Actions in Competition Law*" (January 2013), para 4.6.

⁵² Consultation, paras 5.3-5.6

⁵³ Consultation, para 5.44. See further Part II, paras 79-80 below.

⁵⁴ See, for example, case 1116/4/8/09, *Sports Direct International PLC v Competition Commission*.

⁵⁵ Although see, by contrast, the CAT's observations in relation to the CC's role, and investigative powers, when determining price control matters: *British Telecommunications Plc & Ors v OFCOM (Mobile Call Termination)* [2012] CAT 11 at [118(2)(iii)].

Modification appeals, presently heard by the CC sitting in effect as a tribunal, should be moved to the CAT.⁵⁶

36. Therefore, there may be a case for re-routing price control aspects of communications appeals *directly* to the CMA rather than, as at present, sending these first to the CAT for onward reference. As a corollary, appeals that currently are directed to the CC, but which involve essentially the adjudication between two disputed positions, could sensibly be allocated to the CAT. However, it needs to be borne in mind that even in Communications Act 2003 appeals, for example, there is occasionally fierce disagreement as to whether an issue is or is not a price control matter, or as to the terms of the particular questions to be referred to the CC for determination. A modified regime would need to make clear who would decide such a dispute.
37. As regards achieving greater consistency across sectors, some rationalisation might well be appropriate. However, any proposals for change in this regard will no doubt take account of why the appeal systems in different regulated sectors have evolved as they have, and why outside the communications sector, “appeals” have been relatively few in number. This is at least in part because other sectors (water, energy, rail, aviation etc) have not had an appeal system as such, but instead have been subject to a system of regulatory reference to the CC, which is comprehensive in scope and concept. Regulators and regulated companies alike have been unwilling to have price control assessments in their market considered afresh by another expert body that may come to quite different conclusions. References to the CC may have been threatened, but in general they have been avoided as the incentive on both sides to “settle” is stronger than the incentive to dispute. The exception hitherto has been aviation, where a reference to the CC has until recently been compulsory.

UNMERITORIOUS APPEALS AND “NEW” EVIDENCE

38. The Consultation appears to subscribe to a belief that the CAT’s current procedures encourage too many appeals without sufficient merit, and allow the admission, to the regulator’s disadvantage, of too much “new” evidence (ie material that was not, but ought properly to have been, put to the regulator at the regulatory decision-making stage).⁵⁷ In each case the implication is that the CAT either lacks power to prevent this, or is unwilling to use its existing powers to full effect.
39. The Consultation makes a number of suggestions for improving regulatory decisions themselves, for example by improving internal procedures, making it easier for confidential information to be provided and considered, and requiring individuals to provide evidence at the

⁵⁶ Consultation, para 5.33.

⁵⁷ Consultation, Chapter 6 (page 58ff), “Getting Decisions and Incentives Right”.

investigation stage. As already mentioned, the Government also proposes to limit regulators' potential exposure to a costs order in respect of a successful appellant's costs of appealing.⁵⁸

40. In relation to unmeritorious appeals, the Government proposes, first, that regulators should be more active in challenging inadequate grounds of appeal, and, secondly, that the CAT should be required to review appeals at an early stage and reject those that stand no chance of success.⁵⁹ The CAT's current rules and procedures already provide ample scope for appeals (and indeed defences) to be struck out at an early stage if they are devoid of merit.⁶⁰ It is true that there have been very few such "strike out" applications, but this is because generally speaking few if any obviously hopeless appeals are actually commenced. It needs to be borne in mind that appellants in the CAT are almost invariably responsible companies represented by skilled specialist lawyers whose professional obligations and reputation provide a constraint on the commencement of wholly unmeritorious appeals. Certainly no evidence is advanced in support of the view that too many such appeals are getting through the net. The fact that regulators' decisions are in most cases upheld⁶¹ does not mean that appeals are brought without merit. There would be no harm in encouraging regulators to consider carefully whether a strike-out application might usefully be made at an early stage in any case where they have good reason to consider the appeal hopeless. However, great caution should be exercised before changing the CAT's rules so that such applications become universal or common, as this would be very likely to increase the number of contested hearings, lengthen appeals and increase costs for all parties.
41. A more serious cause for concern is the Consultation's reference to possibly restricting the introduction on appeal of so called "new evidence".⁶² Of course, what is being referred to as new evidence is in general nothing of the kind. In the administrative procedure, evidence is not placed before an impartial court or tribunal: this first happens on appeal to the CAT. So this is not comparable to the situation as between a first instance court and a court of appeal.⁶³ In regulatory and competition appeals, the CAT is the court of first instance. By "new evidence" is therefore meant material which, for one reason or another, was not available to the regulator before it made the decision which is being appealed.

⁵⁸ Consultation, paras 6.18-6.25. We mentioned this in discussing the Government's "Access to Justice" objective (Part I, para 8 above). See Part II, paras 87-92 below for more detailed discussion of the proposals on costs.

⁵⁹ Consultation, paras 6.26-6.28.

⁶⁰ Rules 9 and 10 of the Competition Appeal Tribunal Rules 2003 (SI 2003/1372) ("the 2003 Rules").

⁶¹ See Part II, para 24 below.

⁶² There are various references to this concern in the Consultation but the main articulation is set out at paras 6.9-6.17.

⁶³ As was the situation in the leading case of *Ladd v Marshall* [1954] 1 WLR 1489. In *British Telecommunications Plc v OFCOM* [2011] EWCA Civ 245 at [69]-[70], Toulson LJ specifically noted the "significant differences" between a civil trial and administrative proceedings before OFCOM.

42. The Consultation appears to imply that, under the present system, such material is routinely admitted by the CAT on appeal, and that this not only prolongs proceedings, but places the regulator at a disadvantage.⁶⁴ The Consultation does not suggest that material which could have been adduced at the administrative stage is being deliberately withheld in order to be deployed for the first time on appeal.⁶⁵ The CAT has never encountered such a practice and there are good reasons to believe that it does not occur. To the extent that evidence is produced at the appeal stage which could reasonably have been brought before the regulator in the course of the investigation, the CAT's current rules are perfectly adequate to enable it to admit, exclude or limit evidence where the interests of justice so require.⁶⁶ The CAT can also "punish" such late production of evidence by means of its wide discretion to make costs orders.⁶⁷ Moreover, the regulator is not entirely powerless in the face of any "new" evidence. It is always open to the regulator to apply for a stay or withdrawal of proceedings in order to reconsider its decision afresh in the light of that evidence and taking this course might result in a considerable saving of time, effort and cost.
43. The practice of the CAT in relation to the admission of evidence that has not previously been considered at the administrative stage was explicitly endorsed by the Court of Appeal,⁶⁸ which went on (in the same case) to reject a call from OFCOM to lay down a more precise test.⁶⁹
44. If restrictions of the kind proposed in the Consultation are introduced in relation to the admission of evidence by the CAT, the result will not be a reduction in the number of appeals or a shortening of their overall length. On the contrary, there are likely to be additional and longer appeals both in the CAT and in the Court of Appeal as the parties dispute the admission or exclusion of material by reference to the proposed statutory criteria.⁷⁰ This would be most undesirable. If a party, whether appellant or defendant, wishes to put new evidence before the

⁶⁴ See for example the discussion at paras 6.9-6.17 of the Consultation. Apart from quoting Lord Justice Toulson's statement, in a case in which he approved of the way the CAT had handled the evidence before it, there is no reference to any instance in which the CAT has admitted evidence not available to the regulator in a way that has prolonged an appeal or otherwise harmed the process. See, for more detail, Part II, paras 83-86 below.

⁶⁵ The Consultation accepts that there is no evidence of this kind of gaming the system (see eg para 3.23).

⁶⁶ See, in particular, rules 19(2)(e) and 22 of the 2003 Rules.

⁶⁷ See rule 55 of the 2003 Rules.

⁶⁸ *British Telecommunications Plc v OFCOM* [2011] EWCA Civ 245.

⁶⁹ *Ibid*, per Toulson LJ at [72]-[74], for example at [72]: "...The question for the CAT would be whether in all the circumstances it considers that it is in the interests of justice for the evidence to be admitted. I would not attempt to lay down any more precise test, nor would I attempt to lay down a comprehensive list of relevant factors or suggest how they should be balanced in a particular case. There are several reasons why I consider that it would be inappropriate, and is unnecessary, for this court to do so."

⁷⁰ Thus, the assumption in the Impact Assessment (in the cost / benefit analysis for "Option 3"), that "streamlining measures" will reduce costs to regulators, regulated firms and the courts / tribunals by 25% may not be sound.

CAT which is *relevant* to the main matter which the CAT has to decide, it should be left to the CAT's judicial discretion whether to admit or exclude the material in question. Any fault on the part of a party who seeks to adduce evidence "late" may be reflected in the costs order which the CAT makes.

THE APPEAL PROCESS AND STREAMLINING

45. The Government's views on shortening the length and complexity of regulatory appeals are set out in Chapter 7,⁷¹ although there is discussion in other parts, particularly Chapters 3 and 5. The Government's position appears to be that in general appeals take too long, and the overall length of cases can be reduced by a combination of stricter deadlines and shorter time limits in the CAT (including "fast track" procedures in "simple" cases) and more power for it to exclude or limit expert and other evidence. The Government proposes to "work with" the CAT to shorten its target time-scales.
46. The expeditious resolution of all cases is very important, and it is right to encourage courts (and regulators) to act as quickly as possible. However, although the CAT is not at all complacent about its performance, and welcomes any proposal which would improve it, the Consultation produces scant evidence to support the case that appeals take "too long". It points to the favourable showing of the CAT compared to other EU jurisdictions,⁷² to the extreme swiftness with which most merger appeals have proceeded and the CAT's commitment to the "just, expeditious and economical conduct" of its proceedings.⁷³ Moreover, some of the "solutions" proposed (eg early timetabling of procedural steps in proceedings) are already well-established features of the CAT's case management for every case that comes before it. It is true that in relation to appeals under the Communications Act 2003 the statutory mechanism for reference of price control matters to the CC by the CAT together with other factors such as the need to try preliminary issues, interlocutory appeals and the inter-dependence of cases, can on occasions add to the overall time taken.⁷⁴ In this regard, as we have said earlier, there is some merit in the proposal that the price control element of such appeals should be appealed directly to the CC/CMA. The CAT could still hear any application for judicial review of their decision, as at present.
47. In relation to speed generally, it needs to be borne in mind that the interests of justice require that, wherever possible, the parties be allowed a reasonable time in which to discharge the

⁷¹ Consultation, page 67.

⁷² Consultation, para 7.19.

⁷³ See rule 19(1) of the 2003 Rules.

⁷⁴ The *British Telecommunications Plc v OFCOM (Partial Private Circuits)* case, incorrectly cited in the Consultation as an example of undue length in para 4.7, is discussed at Part I, para 16, and at Part II, para 4(3).

procedural steps required of them and to prepare their respective cases. In this connection the Tribunal frequently receives requests for extensions of the normal time limits. Such requests come at least as often from regulators as from other parties, and may be fully justified in the circumstances of the case.⁷⁵ Subject to an over-arching principle that cases should be dealt with expeditiously and fairly, it should be left to the court or tribunal to manage its casework in its own way. It is not clear in what respect BIS proposes, or is able, to “work with” the CAT to reduce its target timescales.⁷⁶

48. The Consultation proposes that the CAT should be given greater powers to limit the amount of evidence produced and the number of expert witnesses.⁷⁷ The implication is that either the CAT’s present powers are insufficient or that it does not exercise them sufficiently. There is, however, no real evidence to suggest that either concern is justified.⁷⁸ In general, as we have already explained, the exclusion or limitation of evidence must be handled with great care to avoid both possible miscarriages of justice and the generation of satellite litigation. The CAT’s existing powers are ample to enable it to restrict or exclude expert and other evidence where and to the extent it considers this appropriate.
49. The Consultation also proposes the use of “fast track” procedures, modelled on those proposed for private actions.⁷⁹ By its proactive case management practices the CAT already in effect operates “fast track” procedures whenever and to the extent that these are necessary and practicable. For example, the normal time limits for procedural steps are abridged, and/or certain steps omitted altogether, in many merger and price control cases and in applications for interim relief (where time is frequently of the essence). Given that each case coming before the CAT has its own specific circumstances and requirements, we doubt very much that the institution of a formal “fast track” would add anything of value to the CAT’s existing case management powers and practices, which are extremely flexible, thereby enabling the CAT to deal with the particular requirements of each case.
50. The Consultation makes a number of proposals to assist the CAT in its work. These include a statutory mechanism to enable salaried judges from Scotland and Northern Ireland, in addition to those from England & Wales, to be deployed as Chairmen, and removal of the anomalous limitations of tenure of the CAT’s Chairmen.⁸⁰ We welcome these proposals and are grateful to

⁷⁵ Counsel tend to refer in such circumstances to the needs of justice taking precedence over the need for speed.

⁷⁶ Consultation, para 7.11.

⁷⁷ Consultation, para 7.17.

⁷⁸ See the existing provisions of the 2003 Rules, in particular rules 19(e) to (g), 19(l) and 22.

⁷⁹ Consultation, para 7.17.

⁸⁰ Consultation, paras 5.12-5.15.

BIS for supporting our requests in this regard. Another proposal is to enable a Chairman to sit on a case alone where appropriate, for example where it is mainly concerned with points of law.⁸¹ We welcome this proposal too. However, we are strongly of the view that the operation of this power should not be mandatory in any particular category of case, but should always be discretionary: the use of multi-disciplinary panels is one of the CAT's strengths, and it is difficult to define in advance each and every type of case where it would be appropriate for a Chairman to sit alone. This should be determined on a case-by-case basis in the light of all the circumstances.⁸²

JUDICIAL INDEPENDENCE

51. Reform that is intended to alleviate administrative pressures by constraining judicial processes and decision-making risks infringing the vitally important principle of judicial independence that applies, under the separation of powers, to all courts and tribunals. Controls on the admission of evidence, on other case-management issues, and on the time needed to give proper judicial consideration to each case are inherently matters for the court in question, subject to review by a superior court. Imposing overly prescriptive requirements in this area will also risk a conflict with the CAT's fundamental duty to ensure that all parties have access to justice and a fair hearing and may have unintended prejudicial consequences, particularly for SMEs.
52. We are concerned that in a number of important respects the Consultation contemplates or proposes measures which, as well as failing in their expressed objectives of reducing the number, length and cost of appeals, threaten to encroach on the ability of judges to exercise independent judgment when case-managing and hearing appeals against decisions that may be of very great importance both for the undertakings concerned and for the economy in general.

⁸¹ Consultation, para 5.16.

⁸² In relation to fast-track SME private actions it appears to be suggested that a Chairman should be obliged to sit alone (see the proposed new subsection 14(1A) to the Enterprise Act 2002, found at Schedule 7, Part 2 of draft Consumer Rights Bill). We hope that this proposal will be changed to make this discretionary. See also in this connection Part II, para 65 below.

**PART II: DETAILED COMMENTS AND ANSWERS TO
THE CONSULTATION QUESTIONS**

Q1 Do you agree that there should be a presumption that appeals should be heard on a judicial review standard, unless there are particular legal or policy reasons for a wider standard of review?

1. It is difficult to identify any clear principled or evidential basis for such a sweeping presumption. See the CAT's comments at Part I, paragraphs 11 to 22 above. Whatever may finally be decided in respect of appeals against *ex ante* regulatory decisions, challenges to findings of infringement of the competition prohibitions should unquestionably remain appeals "on the merits" as at present. There is no justification for any change in this regard, and an abundance of reasons justifying the *status quo*. We comment further as follows.
2. **Q1** of the Consultation presupposes:
 - (1) That appeals on a "judicial review" standard will be quicker and shorter than appeals on an "on the merits" standard;
 - (2) That an "on the merits" review is somehow inappropriate in the case of appeals from the decisions of regulators made under the Competition Act 1998 and the Communications Act 2003; and
 - (3) That the present regime gives parties "strong incentives" to appeal decisions.
3. However, leaving aside other objections these assertions do not appear to be supported by the evidence put forward in the Consultation, nor are they borne out by the CAT's experience. For the reasons set out below, the CAT's view is that the evidence and experience does not support any "presumption" that a judicial review standard should pertain.

There is no proper basis for the asserting that appeals on a "judicial review" standard will be quicker and shorter than appeals on an "on the merits" standard

4. The Consultation cites no instance where the application of a merits standard by the CAT has caused unnecessary delay and complexity, stating merely that cases "heard on judicial review grounds appear to be resolved more quickly than full merits appeals".⁸³ Further, the data in the Consultation regarding the average time taken by type of appeal (Figure 3.3) and the average length of appeal hearings (Figure 3.4) has been unsoundly compiled and cannot be relied upon. In particular:

- (1) Figure 3.3 identifies seven different “types” of appeal,⁸⁴ and purports to compare them on a “like for like” basis. But these “types” of appeal cannot be compared in this way. They are not “like for like”. By way of example:
- (i) Reviews of mergers (Type (5) “Mergers and markets JR”) are usually conducted on a procedurally expedited basis. An application for review must be made within four weeks (the norm being two months),⁸⁵ and the time for service of a defence is also limited to four weeks (the norm being six weeks).⁸⁶ This expedition in pleadings is carried through in the speed with which hearings are fixed, and the CAT’s general reluctance to grant extensions of time. This is not a consequence of the standard of review, as such, but rather a consequence of the need to resolve these important cases quickly.
 - (ii) This expedition – and the fact that it has nothing to do with the standard of review – can be seen when comparing Type (5) “Merger and markets JR” with Type (6) “Other JRs”. The former – according to the Consultation – take four months, whereas the latter take eleven months. Yet the standard of review is the same.
 - (iii) Price control appeals (Type (7) “Price control”) all involve a reference, by the CAT, to the CC under section 193(1) of the Communications Act 2003 usually following the close of pleadings (ie once the defence and any statements of intervention have been filed) before the CAT. The CC’s review takes a minimum of four months,⁸⁷ but this time period is often extended on the CC’s application to five or six months. Type (7) “Price control” appeals – which are done “on the merits”⁸⁸ – take ten months end-to-end, but about half of this time⁸⁹ will be taken up with proceedings before the CC. If the matter reverts to the CAT, which (if

⁸³ Para 3.15, and see paras 3.13-3.18 generally.

⁸⁴ Namely: (1) “Dispute resolution”; (2) “Ex ante regulation”; (3) “Ex post competition”; (4) “Licence modification”; (5) “Mergers and markets JR”; (6) “Other JR”; and (7) “Price control”.

⁸⁵ As regards the rule in merger cases, see Rule 26 of the 2003 Rules. The general rule, providing for two months, is stated in Rule 8(2).

⁸⁶ As regards the rule in merger cases, see Rule 28(3) of the 2003 Rules. The general rule, providing for six weeks, is stated in Rule 14(1).

⁸⁷ See Rule 5 of the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004 (SI 2004/2068) (“the 2004 Rules”).

⁸⁸ The process is a complex one, laid down in section 193 of the Communications Act 2003. It actually involves a review “on the merits” by the CC, with the possibility of a further judicial review by the CAT of the CC’s “on the merits” determination (see para 58 of the CAT’s judgment in the *Mobile Call Termination* appeals [2012] CAT 11, upheld on appeal by the Court of Appeal). If the CC’s determination is not liable to be set aside on a judicial review, it stands as the CAT’s “on the merits” resolution of the appeal. This process – which is essentially statutory – appears cumbersome, but can be made to work quickly.

there is a challenge) considers whether the determination falls to be set aside on judicial review grounds,⁹⁰ proceedings are generally heard with considerable expedition, as there is usually a great urgency to correct any possible error in a price control whilst it is still ongoing (given the impossibility of retrospective adjustment). Thus, price control appeals are another example of expedited judicial review proceedings before the CAT. A further point to note about price control appeals (and potentially relevant to options for reform – see further paragraph 68 below) is that “pleadings” before the CAT in price control appeals (ie the documents filed and served in the CAT prior to a reference being made to the CC) are not, in reality, pleadings prepared for the benefit of the CAT. Rather, these pleadings set out the parties’ key submissions in connection with the CC’s determination of the price control matters, which are then supplemented through the parties’ core submissions as part of that process. In our view, there is some scope for acceleration and streamlining of this process.

- (2) The statistics on length of appeals and hearings at Figures 3.3 and 3.4 provide a rather bald and misleading view of the relative duration of judicial review and merits cases (and hearings). The Consultation does not appear fully to engage with the statistics, or to consider the implications of including or excluding certain cases from the analysis. For example:
- (i) Included within the statistics in Figure 3.3 are a number of CAT cases, such as *Cable & Wireless UK & Ors v OFCOM (Carrier Pre-Selection Charges)*⁹¹ and *Everything Everywhere Limited v OFCOM (Stour Marine)*⁹² which were lodged, stayed on the parties’ request, but ultimately withdrawn by consent. Including such cases within the statistics will misrepresent the average length of case, because these cases are not actively case-managed by the CAT.
 - (ii) Footnote 7 to the Consultation explains that the statistics “count appeals as they are heard by the CAT – where multiple cases are heard together they are counted as one appeal.” Although this may be a viable approach for multi-party appeals which had a single hearing, applying this approach to the 25 separate appeals against the OFT’s *Construction* decision, which were not heard together, distorts the statistics. Each of these merits appeals had a separate hearing, lasting between

⁸⁹ As stated, a minimum of four months, which period is often extended.

⁹⁰ This is not always the case, as the parties may accept the CC’s determination of the price control matters.

⁹¹ Case 1113/3/3/09.

⁹² Case 1167/3/3/10.

0.5 days and 5 days. Treating these diverse appeals as a single case gives the impression that the CAT took a substantial period of time to consider a single case, when the CAT in fact decided upon all 25 separate appeals in this period, albeit the CAT delivered fewer than 25 substantive judgments as some of the CAT's rulings were "grouped". It also considerably distorts the average length of hearing for the period, as 24 merits appeals with an average hearing length of 0.82 days have been excluded from the statistics.

- (iii) The Consultation does not appear to consider the impact of including two very large multi-party appeals – namely the eight separate *Pay TV* appeals and the six separate *Tobacco* appeals – within the statistics. These were atypical cases which involved hearings of unprecedented length (37 and 29 days respectively), and which skew the data.
 - (iv) If the exceptional *Pay TV* and *Tobacco* appeals are excluded, and the *Construction* appeals are properly considered as individual cases (given that they were not heard together), the distinction in length of hearing between merits appeals and judicial review applications rapidly (taking the same five year period as that set out in the Consultation) vanishes, at an average of **2.54 days** for merits appeals and **2.38 days** for judicial review applications. In the CAT's view, this provides a more accurate reflection of a typical case.
- (3) As a judicial body, the CAT does not act by reference to end-to-end "targets", but rather seeks to do justice in the individual case, and has regard to the need to "secure the just, expeditious and economical conduct of the proceedings" (Rule 19(1) of the 2003 Rules). The Consultation – and in particular Figures 3.3 and 3.4 – does not mention or appear to take account of these cardinal principles. Thus:
- (i) Usually, the CAT will be able to accommodate a hearing extremely quickly, and would be able to fix hearings according to timetables that the parties before it could not meet or could only meet with great difficulty and expense. The time it takes to get to a hearing tends to be informed by the pace at which the parties can reasonably proceed. Often – and this is quite understandable, given that their resources are not unlimited – it is the regulator who asks for more time.⁹³ Of course, it is true (as the Consultation notes, referring to the *Merger Action Group* application for review in paragraph 3.10) that in cases of extreme urgency, cases

⁹³ See, for example, the request made on behalf of the CC regarding the filing of its defence, and timetabling of a hearing, in case 1216/4/8/13 (transcript of case management conference on 24 June 2013, pages 25-30).

can be brought on very quickly. But the cost of doing so (with bigger than usual teams of lawyers working longer than usual hours) is immense, and would prejudice those with more limited financial resources, such as regulators and SMEs.

- (ii) The Consultation assumes – wrongly – that all appeals proceed on a linear basis from the filing of an appeal, to a single judgment at the end of the case. That is simplistic. Cases can frequently involve the hearing and determination of preliminary issues, interlocutory appeals to the Court of Appeal, stays to the proceedings (in particular where the outcome of another appeal process is awaited or the parties are attempting to reach a settlement), or amendment to pleadings (usually in light of disclosure of confidential information to the parties which was not available during the investigation). Each of these factors can have a considerable effect on the end-to-end length of proceedings. A good example is the recent case of *British Telecommunications plc v OFCOM (08 numbers)*,⁹⁴ where the end-to-end length of hearing before the CAT was protracted by an (unsuccessful) interlocutory appeal brought by OFCOM, and by the lodging of two further, related, appeals by BT and Everything Everywhere, which all the parties agreed should be heard together with BT’s first appeal.⁹⁵ The timetable was as follows:

16 April 2010	Summary of appeal published on the CAT’s website.
22-23 June 2010	Hearing of OFCOM’s deemed application to exclude evidence.
8 July 2010	CAT’s judgment on admissibility of evidence handed down, refusing OFCOM’s application.
5 August 2010	OFCOM requests permission to appeal CAT’s judgment.
9 September 2010	CAT refuses OFCOM’s application for permission to appeal.
11 October 2010	Two further, related appeals filed by BT and Everything Everywhere.
29 October 2010	The Court of Appeal gives OFCOM permission to appeal.
10 March 2011	Judgment of the Court of Appeal, dismissing OFCOM’s appeal.

⁹⁴ <http://www.catribunal.org.uk/237-6086/1151-3-3-10-British-Telecommunications-PLC-Termination-Charges-080-calls.html>

⁹⁵ Cases 1168/3/3/10 and 1169/3/3/10.

4-20 April 2011 Hearing of the substantive dispute in the CAT.⁹⁶

1 August 2011 Main CAT judgment handed down in respect of all three appeals.

- (iii) The examples drawn upon in the Consultation fail to take such interlocutory matters, which are commonplace, into account. For example, paragraph 4.7 of the Consultation refers to the case of *British Telecommunications plc v OFCOM (Partial Private Circuits)*⁹⁷ in the following terms:

“In the communications sector, where most appeals are on the merits, there have been a number of long-running, in-depth cases which range over a wide number of issues – arguably slowing down regulatory decision-making and potentially increasing regulatory uncertainty. For example in the BT vs Ofcom (Partial Private Circuits) case, the decision was appealed to the CAT in December 2009 and the CAT provided its judgement in March 2011. This judgment was appealed to the Court of Appeal which gave its judgment in July 2012. A number of other dispute cases were held up, pending the final resolution of this case.”⁹⁸

We would make the following observations in relation to this description:

- (a) This case involved the determination of two important preliminary issues.⁹⁹ Allowing certain issues to be decided as preliminary issues (ahead of a full substantive hearing) has the potential to save parties time and money (and shorten the length of the appeal process), to the extent that success on a preliminary issue has the potential to dispose of the entire proceedings. However, the hearing of preliminary issues can, as here, lead to an extension to the overall end-to-end length of the case, as this involved a two day hearing and the delivery of a judgment running to some 37 pages.
- (b) The timetable of the hearing – as is clear from the CAT’s website¹⁰⁰ – was as follows:

30 December 2009 Summary of appeal published on the CAT’s website.

25-26 May 2010 Hearing of two preliminary issues.

⁹⁶ The main hearing had, in fact, been fixed several months before April 2011, but that hearing date had to be vacated because of OFCOM’s decision to appeal the CAT’s interlocutory decision on evidence, and the time it took for the Court of Appeal to determine the appeal.

⁹⁷ Case 1146/3/3/09.

⁹⁸ Omitting original footnotes.

⁹⁹ See the CAT’s judgment of 11 June 2010 on the preliminary issues, [2010] CAT 15.

¹⁰⁰ <http://www.catribunal.org.uk/237-5136/1146-3-3-09-British-Telecommunications-PLC.html>

11 June 2010	Judgment on the preliminary issues handed down.
20-28 October 2010	Main hearing.
22 March 2011	Judgment in the main hearing handed down.
27 June 2012	Court of Appeal handed down judgment on issues arising out of the preliminary issues judgment and main judgment.

A major factor that contributed to the end-to-end length of these proceedings was the availability of the parties. The CAT had indicated to the parties (at the first case management conference in these proceedings) that it was minded to list the main hearing in June 2010. However, following representations from the parties (including OFCOM), principally connected with the availability of counsel, a hearing was ultimately listed in October 2010.¹⁰¹

- (c) Decisions taken by the CAT at first instance on a “judicial review” standard are just as liable to generate preliminary issues which need to be resolved in advance of the main hearing, and just as liable to be appealed as decisions taken “on the merits”. The period between 22 March 2011 and 27 June 2012, when matters were pending before the Court of Appeal, is therefore altogether irrelevant for purposes of the issues being considered in the Consultation, as is any delay attributable to the need to resolve the preliminary issues in the CAT.
- (4) It is clear from the length of the CAT’s judgments that cases heard on a judicial review standard can still involve issues of considerable complexity. For example, the CAT’s recent judgment in the *Mobile Call Termination* cases,¹⁰² which concerned applications by Vodafone and Everything Everywhere for review of the CC’s determination of the price control matters arising in their appeals (in which context the CAT applies a judicial review standard), ran to 139 pages in length (the CAT’s judgment was delivered in under a month from the conclusion of the hearing in that case). By contrast, the CAT’s recent judgment in two separate appeals by BT heard on the merits ran to just 23 pages.¹⁰³

¹⁰¹ See the transcript of the case management conference on 11 February 2010, pages 15 to 17.

¹⁰² [2012] CAT 11.

¹⁰³ [2011] CAT 15.

5. Additionally, the Consultation does not appear to pay sufficient or proper regard to the ability of an “on the merits” hearing to cure regulatory error without the need for a new decision by the regulator.
6. Appeals on a “judicial review” standard are “all or nothing”. Judicial review is based upon the premise that what is under review is the legality of an administrative decision and the decision-making process, rather than its correctness. Therefore, where a decision is successfully challenged on a judicial review, the reviewing court has no option but to remit the decision back to the administrator (here: the regulator) for the decision to be taken anew. That, of course, involves a fresh consultation and evidence-gathering exercise by the administrator, which in the case of competition and communications decisions is not a short process. The consequence of a successful judicial review is often, therefore, delay coupled with the risk that another reviewable error might be made when re-taking the decision, leading to further proceedings.
7. By contrast, an “on the merits” review can sometimes – this may not be possible in all cases – enable the court (here: the CAT) to substitute for a flawed decision a new decision on the merits, avoiding the kind of delay inherent in successful judicial reviews. In *TalkTalk Telecom Group plc v OFCOM* [2012] CAT 1, the CAT was persuaded by OFCOM that although the decision by OFCOM was procedurally flawed (and so liable to be set aside on a judicial review), the re-hearing on the merits that had occurred cured the procedural flaw (see [136(g)]).¹⁰⁴ Indeed, the CERRE report relied upon by BIS in the Consultation explains that this is the very reason for which a merits review was contemplated under Article 4 of the Framework Directive:

“...Article 4 of the Framework Directive... originally aimed at avoiding that NRA decisions be quashed on the sole basis of procedural failures while they were valid on their merits.”¹⁰⁵

8. Although the Consultation mentions this ability to cure defects in the decision under appeal by an “on the merits” appeal (see paragraph 3.17), it fails to take into account the very considerable savings in time and cost that can result. Another aspect of this, acknowledged in the Consultation, is that a merits appeal avoids the danger of regulators seeking to “JR proof” their decisions by concentrating on procedural and editorial considerations at the expense of the quality or correctness of the decision.

¹⁰⁴ It must be stressed that this is not always possible. In the *Tobacco* litigation (*Imperial Tobacco Group plc & Ors v OFT* [2011] CAT 41), which did not concern a procedural irregularity, but did involve the regulator (the OFT) conceding that its initial substantive decision was unsustainable and inviting the CAT to substitute its own decision, the CAT did not consider it appropriate – despite the application of the OFT – to do this in the circumstances of that case.

¹⁰⁵ Page 125.

9. Further, the availability of a merits appeal will also allow a regulatory decision to stand, notwithstanding an error in reasoning, if the CAT concludes that the regulator’s decision could be supported on another basis. This was made clear by the Court of Appeal in the recent *Mobile Call Termination* proceedings:¹⁰⁶

“The appeal is against the decision, not the reasons for the decision. It is not enough to identify some error in reasoning; the appeal can only succeed if the decision cannot stand in the light of that error. If it is to succeed, the appellant must vault two hurdles: first, it must demonstrate that the facts, reasoning or value judgments on which the ultimate decision is based are wrong, and second, it must show that its proposed alternative price control measure should be adopted by the Commission. If the Commission (or Tribunal in a matter unrelated to price control) concludes that the original decision can be supported on a basis other than that on which OFCOM relied, then the appellant will not have shown that the original decision is wrong and will fail.”

By contrast, were a judicial review standard to apply in such a case, the regulator’s decision might well have to be quashed and retaken, leading to a much longer end-to-end process for all concerned.

Is “on the merits” review somehow inappropriate in the CAT cases in which it is currently applicable?

10. As already discussed, the CAT would have particularly serious concerns about any change which might have the effect of restricting the current level of judicial oversight of *ex post* infringement decisions under the Competition Act 1998.¹⁰⁷ However, before such changes are made in respect of *any* appeals which are currently “on the merits”, there should be good reason for so acting. Here, the appropriateness of an “on the merits” review is considered (as **Q1** invites) generally, with reference to some of the statements made in the Consultation.
11. The Consultation proceeds generally on the basis that appeals on a “judicial review” standard are less intrusive than “on the merits” appeals, and that “on the merits” appeals cause the review body to “act as a second regulator ‘waiting in the wings’” (paragraph 3.18; also paragraph 1.12). These are presented as reasons sufficient to justify a move away from “on the merits” review.
12. Essentially, what is being suggested is that when the CAT hears an appeal “on the merits”, it is inclined to substitute its view on policy questions for that of the regulator, and thus acts as a “second regulator ‘waiting in the wings’”, to quote from the Consultation.
13. The Consultation therefore proceeds on the assumption that appeal bodies, such as the CAT, routinely engage with matters of regulatory judgment, and seek to look at such matters afresh on

¹⁰⁶ [2013] EWCA Civ 154 at [25].

¹⁰⁷ See Part I, paras 11-22 (“on the merits” generally) and Part I, paras 23-31 (competition cases). The different considerations are also addressed in answer to **Q4** (communications cases) and **Q6** (competition cases).

appeal.¹⁰⁸ However, no examples are put forward in the Consultation of the CAT (or any other court) behaving in such a manner, whether under a judicial review or “merits” standard, nor would such an approach be consistent with the very clear line of authority on this issue in both the CAT and the Court of Appeal, including the very case quoted (yet unattributed¹⁰⁹) in the Consultation, namely the Court of Appeal’s 2008 judgment in *T-Mobile (UK) Limited v OFCOM (Termination Rate Disputes)* [2008] EWCA Civ 1373, in which it was held, at [31]:

“...it is inconceivable that Article 4 [of the Framework Directive], in requiring an appeal which can duly take into account the merits, requires Member States to have in effect a fully equipped duplicate regulatory body waiting in the wings just for appeals. What is called for is an appeal body and no more, a body which can look into whether the regulator had got something materially wrong. That may be very difficult if all that is impugned is an overall value judgment based upon competing commercial considerations in the context of a public policy decision.”

14. Concerns that an “on the merits” review might lead to excessive second-guessing of regulators ought, by now, to have been laid to rest. Questions of policy or discretion are typically cases where there are several “right” answers. Where there are a number of competing, legitimate views, the CAT will not interfere in a regulator’s decision unless it is clearly wrong. The following decisions of the CAT – all cases involving an “on the merits” review – demonstrate this:

- (1) *T-Mobile (UK) Limited v OFCOM (Termination Rate Disputes)* [2008] CAT 12 (i.e. the CAT proceedings that led to the Court of Appeal judgment cited at Part II, paragraph 13 above) at [82]:

“It is...common ground that there may, in relation to any particular dispute, be a number of different approaches which OFCOM could reasonably adopt in arriving at its determination. There may well be no single “right answer” to the dispute. To that extent, the Tribunal may, whilst still conducting a merits review of the decision, be slow to overturn a decision which is arrived at by an appropriate methodology even if the dissatisfied party can suggest other ways of approaching the case which would also have been reasonable and which might have resulted in a resolution more favourable to its cause.”

¹⁰⁸ The Consultation refers in various places to the desirability of moving to a standard of review which allows “for the proper exercise of independent judgement” (para 1.8), and points to a “risk that appeals become the de facto route for decision-making, with appeals bodies being asked to make detailed regulatory judgements, effectively becoming a second regulator” (para 1.12). In the summary at Chapter 3, the Consultation states that “the standard of review [in the communications sector]... allows the appeal body significant scope to review regulators’ judgements”. At para 4.18, the Consultation also states that: “The Government believes that appeals should focus on identifying material errors or unreasonableness in regulatory decisions, rather than providing for a second body to reach its own regulatory judgment.”

¹⁰⁹ This is not the only example of an unattributed quote within the Consultation. For example, para 2.7 of the Consultation quotes (without reference) from the Tribunal’s judgment in *BAA Limited v Competition Commission* [2012] CAT 3 at [20(6)]. Although this may seem a relatively minor point to raise in our Response, in our view it is somewhat misleading to quote (without attribution) from clear authority, and present such authority as a statement of a perceived current risk.

- (2) *Albion Water Limited v Water Services Regulation Authority* [2008] CAT 31 at [72]:

“...whilst carrying out an assessment of the merits of the case, [the CAT can] give due weight to a finding which is arrived at by an appropriate and reliable methodology, even if a dissatisfied party could suggest other ways of approaching the issue which would have been reasonable and which might have resulted in a resolution more favourable to its case...”

- (3) *British Telecommunications plc v OFCOM (080)* [2011] CAT 12 at [230]:

“We consider questions of policy preference to be, *par excellence*, the sort of question where there is no single “right answer”, and we agree with the Tribunal’s statement in *T-Mobile* that the Tribunal should be slow to overturn such decisions. This is particularly the case here, where OFCOM is seeking to articulate policy preferences that are compliant with its statutory duties under the 2003 Act. We remind ourselves that these duties, which are broadly framed and clearly give OFCOM a measure of discretion, are duties imposed upon OFCOM itself and not on this Tribunal.”

- (4) *Telefónica UK Limited v OFCOM* [2012] CAT 28 at [45]:

“...the weight to be attached to different considerations in forming a value judgment is a matter for OFCOM, as the NRA charged with the duty of resolving disputes, and in the absence of any misdirection by OFCOM the court will normally respect its determination, whether or not the court would itself have balanced the considerations in the same way and reached the same conclusion.”

- (5) *British Sky Broadcasting Limited & Ors v OFCOM* [2012] CAT 20 at [84]:

“...the Tribunal should apply appropriate restraint and should not interfere with OFCOM’s exercise of a judgment unless satisfied that it was wrong.”

15. Further, the Consultation arguably overstates the difference between the CAT’s approach “on the merits” and the *Wednesbury* unreasonableness of judicial review. The point has already been made (Part I, paragraph 14) that the intensity of both the “on the merits” and the “judicial review” standards can vary from case to case.
16. When it comes to points of law there is no real difference between “on the merits” appeals and the “judicial review” standard. If the regulator has made a *material* error of law, then that will be corrected, whatever the standard of review on appeal. (“Immaterial” errors of law, by definition, are immaterial, and so cannot affect the decision and will be disregarded by the reviewing court. That is true, whatever the standard of review.)
17. As far as questions of fact are concerned, even on a “judicial review” standard the court is entitled to consider whether a material factual finding is adequately supported by the evidence, and will certainly examine with some intensity questions of “jurisdictional fact”, ie factual questions that go to the decision-maker’s jurisdiction in respect of the decision in question. “On the merits” appeals are likely to be more intense when it comes to disputes of fact, but here too the court will not be concerned with immaterial errors.

18. Although to some extent a question of policy, the ability – in the context of fact-heavy and critically important decisions – properly to review material findings of fact where they are disputed is surely desirable. Where a regulator has made a material error in such a finding, is it appropriate that the decision should nevertheless stand on a false basis of fact?
19. On the face of it, the Consultation does not appear to recognise the importance to individual entities of many of the decisions in the spheres in question (see further Part I, paras 25 to 31 above, and the answers to **Q4** and **Q6** below). A finding of unlawful anti-competitive behaviour carries with it not only sanction in the form of very large fines, but also the stigma of *quasi*-criminal conduct and the potential for follow-on litigation in the form of civil actions for damages. Nor should the importance of some regulatory decisions under the Communications Act 2003 be underestimated. For example, cost and price controls can constrain a firm’s freedom to price for years on end (controls typically run for three or four years) and a regulated firm can be required to provide access on regulated terms to certain key facilities or services.
20. Given that these decisions really matter, and are essentially decisions based on fact (for example, whether there has been a cartel, whether significant market power exists or has been abused, all involve factual questions), the sort of approach advocated by the Consultation where, in effect, the regulator has the last word, fails to respect the legitimate interests of regulated entities.¹¹⁰ Further (as the CERRE report recognises) substantial appeals are “probably unavoidable in view of the legal, technical and economic complexity of the subject matters of these appeals”.¹¹¹
21. The positive features of an “on the merits” appeal are further discussed in the responses to **Q4** (communications cases) and **Q6** (competition cases) below.

The suggestion that the present regime gives parties “strong incentives” to appeal decisions

22. See the CAT’s comments on matters of principle at Part I, paragraph 10 above. The Consultation suggests (see, in particular, the “Summary” at page 18) that “there appear to be strong incentives on parties to appeal decisions”, which (it is suggested) “may” be due to:

- (1) “the standard of review, which allows the appeal body to review regulators’ judgements”;

¹¹⁰ There are a number of cases where regulators have made material factual findings which were erroneous . See, for example, *North Midland Construction Plc v OFT* [2011] CAT 14, at [28]-[31]; *Imperial Tobacco Group Plc & Ors v OFT* [2011] CAT 41, at [46]-[47], and [61]; *Tesco Stores Limited & Ors v OFT* [2012] CAT 31, at [219]-[220], [324]-[325], [355], [396]-[397], and [430]; *British Sky Broadcasting Limited & Ors v OFCOM* [2012] CAT 20, at [27]-[38], [227]-[229], [310]-[311], and [831]-[832].

¹¹¹ Page 108 of the CERRE report.

- (2) “the fact that some appellants face a limited downside to appealing, even if their appeal is not upheld, compared with significant potential upside if the appeal is won”.
23. In the CAT’s view, neither of these matters supports a finding of a strong incentive to appeal. Given the clear line of authority on the matter (see Part II, paragraph 14 above), appellants cannot expect that a regulator’s judgment will be the subject of “second-guessing”. Further, the view expressed that there is a “limited downside to appealing” disregards a number of very obvious matters considered further at paragraphs 25 to 27 below. The main reason, why regulators’ decisions are appealed is because they are often of considerable economic, commercial and reputational significance to the parties affected by them, and this important point is not acknowledged in the “Summary” on page 18 of the Consultation. In a recent appeal, BT highlighted that the amount at stake in connection with just one of its grounds of appeal was £200 million per year,¹¹² and such sums are commonplace in CAT proceedings. The second bullet in paragraph 3.6 of the Consultation does acknowledge that – as regards appeals against OFCOM decisions – “as might be expected more appeals have been brought against the most significant decisions OFCOM has taken”. However, the Consultation does not appear to accept that this is the main reason why regulatory decisions are appealed.
24. Even according to the Consultation, the number of appeals as a proportion of the number of decisions taken does not appear to be unreasonable or (given the significance of the decisions) particularly high. Paragraph 3.6 of the Consultation notes that “[a]s might be expected, the number of decisions appealed is a relatively small proportion of the absolute number of decisions”. According to Figure 3.2, of the 160 decisions taken by OFCOM in the period 2008 to 2012, only about 12% were appealed. The Consultation does not explain why decisions taken by the UK’s primary competition authorities, the OFT and CC, are not included within these figures.
25. The suggestion that an appealing party has “nothing to lose” by appealing is not correct. In fact there are a number of downsides to bringing an appeal. First, there must be reasonable grounds – a hopeless appeal will not survive, as the CAT has a broad jurisdiction to strike out such a case at an early stage.¹¹³ Secondly there are financial and commercial risks, including the diversion (sometimes intensively and for long periods) of personnel from their normal business activities. The cost of this alone can be very substantial.

¹¹² See the transcript of the case management conference on 31 May 2012 in cases 1192/3/3/12 and 1193/3/3/12, at page 21.

¹¹³ As explained earlier, very few hopeless appeals have ever been brought in the CAT. There are reputational as well as commercial disadvantages for undertakings and their legal representatives in mounting a case which has no merit.

26. Leaving aside such indirect costs, the direct costs of mounting an appeal in respect of a regulator's decision are considerable and – even if the appeal is wholly successful – the appellant can only expect to recover a proportion of its total costs. If the appeal is unsuccessful, then not only will the appellant bear its own costs, but there will be an exposure to pay the costs of the other party or parties (which will not be insubstantial). Moreover, because the CAT has an extremely broad discretion in relation to costs, it is possible (amongst many other things) to make “issues-based” costs orders. Thus, even where an appealing party has achieved a successful outcome, if it has advanced multiple arguments, some of which have succeeded, and some of which have failed, its costs recovery may be limited to reflect this (see, for example, the CAT's ruling on costs in *National Grid PLC v GEMA* [2009] CAT 24 at [12]-[13]). There are thus powerful incentives on appellants to avoid taking bad points.¹¹⁴
27. Any incentive that a party may have to delay the effect of a decision by bringing an appeal (as suggested at paragraph 3.24 of the Consultation) is also likely to be mitigated by the possible exposure to a liability in interest payments (see, for example, *Quarmby Construction Company Limited v OFT* [2011] CAT 11 at [214]).

OFCOM's award of spectrum in the 2.6 GHz band

28. There are repeated references in the Consultation (and the accompanying Impact Assessment) to the delay to OFCOM's award of spectrum in the 2.6 GHz band: see, for example, paragraphs 3.25, 4.10, 4.28 and Annex E of the Consultation; pages 11-12 of the Impact Assessment).
29. For example, it is stated that:
- “...in many cases regulators must wait for an appeal to concluded before it can take action on other matters that may be related or unrelated to the case... Such delays can also lead to consumer benefits being deferred as was the case in the 2.6 GHz spectrum auction. In this case the series of appeals against Ofcom decisions about the proper way to make spectrum available for 2.6 GHz mobile broadband served to delay the auction. This led to delay in the launch of services and hence to delivering benefits to consumers.”
30. It is thus implied that the CAT was, at least in part, responsible for the delay to OFCOM's planned award of spectrum. This would not be correct, as the cases referred to in the Consultation (cases 1102 and 1103/3/3/08) are in fact examples of the CAT acting with extraordinary expedition to decide an important jurisdictional issue.

¹¹⁴ The Consultation refers at para 3.21 to the CAT's costs awards in communications cases. As some cases brought under the Communications Act 2003 are withdrawn, or the question of costs is settled directly between the parties, it may be more appropriate to refer to the number of costs rulings, rather than the number of cases. On this basis, the CAT has made orders awarding costs in just under half of its costs rulings. It should also be noted that OFCOM, where it has succeeded in defending an appeal, has tended only to seek the costs of external counsel, rather than its full costs.

31. The main hearing in these cases took place within one month of the appeals being lodged, and the CAT delivered its judgment within nine working days of the hearing. The CAT thus disposed of both appeals with commendable speed, and a notion that the CAT was in any way responsible for regulatory gridlock or deferred consumer benefits would be entirely misplaced.
32. Indeed, these appeals serve to demonstrate a rather different point, namely that it can be anticipated that any ambiguity regarding the scope of an appeal body's jurisdiction or its procedural rules (for example, as regards the standard of review that pertains, or the test for the admissibility of evidence) will be extensively tested by the parties in litigation.

Q2 Do you agree with the Government's principles for non-judicial review appeals set out in Box 4.1? If you disagree, what would you propose?

33. See the comments on matters of principle at Part I, paragraphs 13 to 22 above. In paragraph 4.19 of the Consultation, it is noted that "[j]udicial review is...a flexible standard as it is not defined in statute but is based on case law". This is equally true of the "on the merits" standard. It is a flexible, but clear, test. The criticism of the term "merits review" contained in paragraph 4.9 of the Consultation is unfounded. There is no inconsistency between subjecting the decision of a regulator to "profound and rigorous scrutiny", whilst accepting that certain questions (typically questions of regulatory judgment, policy and discretion) have multiple "right" answers, and it is for the regulator and not the court to choose *which* right answer should pertain in any given case.
34. The "on the merits" test has been considered in a number of cases and its particular application to competition and communications cases is understood. A number of cases showing the respect accorded to a regulator's discretion and policy decisions have already been cited (see Part II, paragraph 14 above). The nature of the "on the merits" standard was considered in *British Telecommunications plc v OFCOM (Admissibility of evidence)*,¹¹⁵ which made the following points:
- (1) There are two aspects to the standard. First, a requirement that the CAT decide the appeal "on the merits" (this has already been considered in connection with **Q1** above). And, secondly, that the CAT decide the appeal "by reference to the grounds of appeal set out in the notice appeal". Both aspects are important.
 - (2) This second requirement makes it clear that the CAT's review is confined to those issues that the appellant raises in its notice of appeal, and does not amount to a rehearing (as, for example, is the case on an appeal to the Crown Court under section 79(3) of the Senior

¹¹⁵ [2010] CAT 17 at [66] to [78].

Courts Act 1981). If a point is not specifically challenged by an appellant in its notice of appeal, the regulator’s decision stands in that respect. The issues before the CAT will thus be much narrower than those before the regulator. As the CAT stated at [76]:

“By section 192(6) of the 2003 Act and rule 8(4)(b) of the [2003 Rules], the notice of appeal must set out specifically where it is contended OFCOM went wrong, identifying errors of fact, errors of law and/or the wrong exercise of discretion... OFCOM’s decision is reviewed through the prism of the specific errors that are alleged by the appellant. Where no errors are pleaded, the decision to that extent will not be the subject of specific review. What is intended is an appeal on specific points.”

35. Given the Government’s stated commitment to “stable and predictable frameworks”,¹¹⁶ and the likelihood that any statutory change is likely to give rise to legal uncertainty and legal challenge, it is not clear what would be achieved (or improved) by a change in the standard or grounds of review in the form proposed (Box 4.2), particularly in light of the following considerations:

- (1) A statutory provision enabling the CAT to allow an appeal where the decision is based on a “material error of fact” (proposed section 195(2A)(a)) or a “material error of law” (proposed section 195(2A)(b)) is arguably simply restating in different form the existing law. The term “material” is not used in the existing rules – rightly, because no rational tribunal would allow an appeal based on an immaterial point, and no party would (for that reason) seek to run an immaterial point. There is also clear authority from the Court of Appeal that the CAT is required to identify whether the regulator “got something materially wrong.”¹¹⁷ However, the very fact of the grounds of appeal being reformulated will give cause for argument that some change of meaning and effect must have been intended. One can anticipate much additional argument being engendered before the CAT, and no doubt the Court of Appeal, as to what “material” actually means, and whether the CAT did or did not have jurisdiction to decide the appeal because the error was in fact “immaterial”. This is inherent in the Consultation’s acknowledgment that not all such errors (of fact, law or procedure) “will result in overturning a decision”.
- (2) Proposed sections 195(2A)(d) and (e) deal with discretion, judgments and predictions – all cases where there are potentially numerous “right” answers, which would therefore be decided in accordance with the case-law described in Part II, paragraph 14 above. It is highly likely that parties will (according to their interest) dispute whether a given issue is, on the one hand, a question of fact/law or, on the other hand, a question of

¹¹⁶ Consultation, page 7.

¹¹⁷ *T-Mobile (UK) Limited v OFCOM (Termination Rate Disputes)* [2008] EWCA Civ 1373 at [31].

discretion/judgment/prediction, because the CAT's ability to intervene is different in these cases. This is just the sort of satellite litigation that slows regulatory appeals down.

- (3) Proposed section 195(2A)(c) states that an appeal can be allowed "because of a material procedural irregularity". It is not known whether the drafting intention here is to preclude an "on the merits" appeal from curing a procedural defect in the decision (as occurred in *TalkTalk*: see Part II, paragraph 7 above), but that could be the effect. Naturally, the question of whether the decision in *TalkTalk* should be overruled by statute is not one for the CAT (indeed, the decision in *TalkTalk* is itself presently before the Court of Appeal): but it would appear to be a retrograde step with the unintended consequence of leading to more decisions being overturned on appeal and a lengthier remedial process overall.
- (4) Interestingly, the proposed section actually expands upon the existing standard of review for communications appeals in one regard: it appears to remove the requirement (discussed at Part II, paragraph 34 above) that the CAT should decide the appeal in accordance with the grounds of appeal.

36. In short, the adoption, by amendment to the relevant legislation, of principles set out in Box 4.1 may well not bring about any material change in the standard of review that currently pertains in the CAT, but will almost certainly stimulate a potentially long and disruptive period of satellite litigation.

Q3 How would moving to a judicial review standard impact the length, cost and effectiveness of the appeals framework?

37. For the reasons given in Part II, paragraphs 4 to 9 above, the evidence advanced in the Consultation suggesting that a shift to a "judicial review" standard would impact the end-to-end length of appeals and the length of hearings does not appear to be sound. It is very doubtful that the change would make any significant difference to the length and cost of appeals. As has been highlighted above, considerable care must be taken when seeking to draw conclusions from raw statistics in relation to case and hearing length.¹¹⁸

¹¹⁸ We would also urge caution when seeking to draw direct comparisons with appeals in other EU Member States, or as between the CAT and other judicial bodies acting in different areas of law. In particular, the nature of the cases at issue in the relevant appeals must be taken into account. For example, it is immediately apparent from a review of the High Court cases included at Annex E of the Consultation (and Annex B of the Impact Assessment) that the cases concerned are quite unlike the multi-party, complex and technical cases coming before the CAT. A number of these included failed permission applications and small single-issue cases (and many of these took a period of several months merely to get to a permission hearing). The only case which directly relates to a competition investigation (*Crest Nicholson*) took 14 months to conclude. By contrast, the CAT decided 25 separate merits appeals (raising issues of liability and penalty) over a broadly similar period in connection with the same OFT investigation.

38. Indeed, until any new regime has “bedded down”, with its limits and parameters tested in litigation, it is most likely that any change would (for the best part of a decade) result in increased litigation and therefore longer and costlier regulatory appeals.
39. As to effectiveness, for the reasons given in Part II, paragraphs 4 to 9 above, and in answer to **Q4** and **Q6** below, it is suggested that a move to a “judicial review” standard is unlikely to enhance, and may impair, the effectiveness of regulatory appeals.

Q4 For decisions in the communications sector, do you agree that there should be a change in the standard of review? If so, should this be to a judicial review, a more focused ‘specified grounds’ approach, or something different?

40. This answer to **Q4** does not repeat the answers given to **Q1 to Q3**, which pertain, and we refer also to the comments on matters of principle at Part I, paragraphs 12 to 22 above. It is questionable – for the reasons given in answer to those questions – whether the envisaged changes would achieve the ends anticipated in the Consultation. Rather, there would be a risk, at least in the short term, of increased cost and increased litigation. The regime under the Communications Act 2003 is now well-established, and its limits and operation clarified in a series of cases (many at Court of Appeal level) in the last decade.
41. That said, the appropriate standard of review is a matter of policy, and the CAT will apply whatever standard of review is established by the legislature. For this reason, this answer to **Q4** confines itself to some general observations on the consequences (in relation to communications cases) of a move away from the present “on the merits” regime to a regime based upon a “judicial review” standard:

- (1) There may be a challenge to the legality of the regime. As is well known, Article 4(1) of the Framework Directive provides:

- “(1) Member States shall ensure that effective mechanisms exist at national level under which any user or undertaking providing electronic communications networks and/or services who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved. This body, which may be a court, shall have the appropriate expertise available to enable it to carry out its functions. Member states shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism. Pending the outcome of any such appeal, the decision of the national regulatory authority shall stand, unless the appeal body decides otherwise.
- (2) Where the appeal body referred to in paragraph 1 is not judicial in character, written reasons for its decision shall always be given. Furthermore, in such a case, its decision shall be subject to review by a court or tribunal within the meaning of Article 234 of the Treaty.”

The Communications Act 2003 was enacted with a view to complying with these (and other European law) provisions. It is possible that any derogation from the present standard of review would result in a legal challenge, with a reference to the Court of Justice under Article 267 TFEU.

- (2) OFCOM's dispute resolution process. OFCOM takes many types of decision and makes many types of determination. One of these is resolving disputes between communications providers pursuant to sections 185 to 190 of the Communications Act 2003. In such cases, OFCOM acts as a resolver of private disputes between communication providers, albeit that OFCOM retains the right to apply its regulatory policies in the resolution of such disputes. A court, were it resolving a private dispute at first instance, would apply an “on the merits” approach. The question arises whether it is appropriate for an appeal from an administrative regulator to be more circumscribed. It is worth noting that – to the extent that such disputes do not involve a “policy question” – any appeal can currently be resolved without OFCOM's participation. As the Court of Appeal observed in the postscript to its judgment in *British Telecommunications plc v OFCOM plc* [2011] EWCA Civ 245 (at [87]), although in dispute resolution cases OFCOM is named as a respondent as a matter of form, it “should not feel under an obligation to use public resources in being represented on each and every appeal from a decision made by it, merely because as a matter of form it is a respondent to the appeal”.
- (3) Is the judicial review standard appropriate in respect of price control decisions? As was described in Part II, paragraph 19 above, price (or cost) control decisions are extremely important and generally highly contentious decisions that are regularly taken by OFCOM. They are highly contentious, because they involve imposing *ex ante* limits on what would otherwise be the normal freedom of communications providers to price their services. Therefore they can only be imposed where stringent conditions have been satisfied (in particular, a finding that “significant market power” exists in the market in question). These decisions are very fact sensitive. A question may therefore arise whether a move away from an “on the merits” standard of review is appropriate. In addition – as has been noted in Part II, paragraph 7 above – in certain cases an “on the merits” review permits the “curing” of a procedurally defective decision and – where a decision is substantively wrong – an ability to cure the defect without having to embark upon a completely fresh consultation process.

42. Paragraph 4.42 of the Consultation (which precedes this **Q4**) refers to the Court of Appeal's judgment in the *08 numbers* litigation (also discussed at Part II, paragraph 4(3) above).

However, as we pointed out to BIS in correspondence some time ago,¹¹⁹ the Consultation misunderstands and in doing so, misrepresents, what the Court of Appeal was actually saying. The Consultation states as follows: “BT had argued that OFCOM had made a wrong value judgement. The Court of Appeal found that the CAT did not have the jurisdiction to overturn OFCOM’s decision for this reason.” This was not the basis on which the Court of Appeal allowed OFCOM’s appeal, and the Court of Appeal did not find that the CAT had wrongly interfered with a value judgement made by OFCOM. The relevant passage from Lloyd LJ’s judgment should be read as a whole:¹²⁰

“...Although the Tribunal is an expert and specialised body, it is not set up as a second tier regulator of the sector, and it seems to me that, absent new evidence which shows that the factual basis on which OFCOM proceeded was wrong, or an error of law, the Tribunal ought to respect the policy decisions and matters of judgment involved in OFCOM’s decisions. To an extent the Tribunal did so, for example as regards respecting OFCOM’s policy preference as regards the pricing of 080x calls. Consistently with that, it does not seem to me that it was open to the Tribunal to balance the various potentially conflicting considerations relevant to the regulatory objectives in a different way from that adopted by OFCOM, unless an error could be shown in OFCOM’s approach. **Nor, to be fair, was it argued before us that this is what the Tribunal had done. The basis for their disagreement with the conclusion reached by OFCOM was that OFCOM’s approach had been wrong because of the three misdirections identified, not that OFCOM had considered the right questions on the right material but had weighed up the relevant factors wrongly:** see paragraph 231 where the Tribunal said: “Accordingly, we consider that we must ask ourselves ... whether the approach in fact adopted by OFCOM was a “wrong” approach”.” (Emphasis added)

Q5 What would be the impacts on the length, cost and effectiveness of the appeals framework if the standard were changed to: (i) judicial review; and (ii) focused specified grounds?

43. For the reasons given in answer to **Q1**, **Q2** and **Q4**, it is questionable whether the changes envisaged by the Consultation for communications appeals would result in a more effective regime. The reverse may be true.
44. In terms of time and cost implications, the answer to **Q3** is repeated.
45. Many communications appeals are currently concluded by the CAT in very short periods. For example, the case of *Vodafone Limited v OFCOM (Mobile Call Termination)*,¹²¹ a price control appeal where parties brought judicial review challenges to the CC’s determination of the price control matters, was heard with considerable expedition. The CAT imposed a very tight timetable to dispose of the appeals, for example listing a CMC the day after the CC’s determination. This was necessary given that, by the time the price control matters were determined by the CC, nearly a quarter of the period covered by the price control had elapsed.

¹¹⁹ Letter from the Registrar of the CAT to Chris Jenkins of BIS dated 10 February 2013.

¹²⁰ [2012] EWCA Civ 1002, at [90].

¹²¹ Cases 1180-1183/3/3/11.

The CAT's judgment of 137 pages was handed down within one month of the main hearing in the proceedings, and traversed detailed questions of law and economics.

Q6 For decisions under the Competition Act 1998 (which do not involve setting the level of penalties) do you agree that there should be a change in the standard of review? If so, should this be to a judicial review, a focused 'specified grounds' approach, or something different?

46. We refer to the answers given to **Q1 to Q3**, which pertain, and also to our comments on matters of principle at Part I, paragraphs 23 to 31 above. For the reasons there set out we consider that there is no justification for changing or reformulating the standard of review in respect of the decisions referred to in **Q6**. As noted at Part I, paragraph 23, the Consultation does not put forward any evidence why a merits appeal in relation to findings of competition law infringement is inappropriate, nor is the Government's significant change of position (from its March 2012 response to the consultation titled *Growth, Competition and the Competition Regime*) explained. Further, it is unlikely – for the reasons given in answer to those questions – that the envisaged changes will achieve the ends anticipated in the Consultation. Rather, increased cost and increased litigation are to be anticipated. Given the quasi-criminal nature of a finding of infringement of the competition prohibitions, it is possible that a challenge would be brought to the compatibility of a revised standard of review with the requirements of Article 6 ECHR. Further, the Competition Act 1998 regime is a very well-established one, and its limits and operation have been tested in court and are clear to all the stakeholders.¹²² It would be unfortunate were the benefits of this accumulated learning and practice to be lost.
47. Although this is inevitably a subjective opinion, on which the Government will no doubt reach its own view, no appetite to change the present system is detectable, and it is a system that appears to be working well, albeit against a backdrop of a low overall number of competition law enforcement decisions (and, hence, appeals) Given the emphasis placed in the Consultation on the importance of “stable and predictable regulatory frameworks” (see, eg, page 7 of the Consultation), it is unclear what would be achieved by a modification to the standard of review in this area.
48. Although in general terms the standard of review of administrative decisions is a matter of policy, a reduction in the current standard of review in respect of infringement decisions under the Competition Act 1998 would give rise to a number of serious concerns (see Part I, paragraphs 25 to 31). More specifically:

¹²² See the remarks of Helen Davies QC in the article cited at fn 32 above.

- (1) A “judicial review” standard is inappropriate where findings of quasi-criminal conduct are being made. A finding of anti-competitive behaviour carries with it – in addition to the potential for extremely large fines – the stigma of having been found guilty of *quasi-criminal* conduct. Such a finding by an administrative body (whether that be the OFT, as it presently is, or one of the sectoral regulators, like OFCOM) should, as a matter of basic justice, be capable of challenge “on the merits” before an impartial judicial body. Such a “merits” challenge should be capable of including disputed questions of fact.
- (2) It is appropriate that a finding of unlawful anti-competitive conduct is capable of challenge “on the merits” because it is incapable of challenge in “follow-on” damages claims. Even in cases where no fine is imposed by the competition authority, a finding of unlawful anti-competitive behaviour carries with it an exposure to damages pursuant to a “follow-on” claim (presently provided for in section 47A of the Competition Act 1998).¹²³ In these actions, the finding of anti-competitive behaviour cannot be challenged by the defendant, and must be accepted by the court, whose only function it is to assess what damages have flowed from the anti-competitive behaviour (as a matter of causation and quantum). In such circumstances, it would be unfair if a party subject to such a finding by an administrative body was unable to challenge this finding “on the merits”.

Q7 What would be the impacts on the length, cost and effectiveness of the appeals framework if the standard were changed to: (i) judicial review; and (ii) focussed specified grounds?

49. For the reasons given in answer to **Q1**, **Q2** and **Q6**, it is questionable whether the changes envisaged by the Consultation for competition appeals would result in a more effective regime. The reverse may well be true, particularly when the interests of justice are taken into account.
50. In terms of time and cost implications, the answer to **Q3** is repeated.

¹²³ Examples of cases where no fine was imposed, but a company was exposed to a follow-on action for damages include case 1166/5/7/10 *Albion Water Limited v Dŵr Cymru Cyfyngedig* and case 1178/5/7/11 *2 Travel Group PLC (in liquidation) v Cardiff City Transport Services Limited*. In such cases, a firm is also potentially exposed to an award of exemplary damages (again, see *2 Travel*).

Q8 For price control decisions in the communications, aviation, energy and postal services sectors, do you agree that there should be a change in the standard of review? If so, should this be to judicial review, a focused and consistent ‘specified grounds’ approach, or something different?

51. Two, preliminary, points can be made:

- (1) First, these are not cases where the CAT is the primary appeal body. The primary reviewing body is generally the CC, carrying out such a review “on the merits” (although the statutory formulation varies from case to case). In the case of communications appeals under the Communications Act 2003, appeals are directly to the CAT, which considers whether “price control” questions arise out of the appeal. These are then referred, by the CAT, to the CC (see, principally, section 193 of the Communications Act 2003), which (in effect – the statutory scheme is complex) decides the matter “on the merits”, subject to a “judicial review” by the CAT if the CC decision is challenged. In the case of postal services appeals, OFCOM sends any appeal raising price control matters directly to the CC (see paragraph 59 of the Postal Services Act 2011).
- (2) Secondly, the position of the CC within the pantheon of competition regulators is undergoing profound change pursuant to the Enterprise and Regulatory Reform Act 2013: the functions of the CC and the functions of the OFT are being taken over by the CMA. The implications of this, in terms of how regulatory appeals will be handled, are in the process of being worked out.¹²⁴ However, any structure in which the decisions of one administrative body are reviewed by another administrative body will still require supervision by the court.

52. Significantly, both the Communications Act 2003 regime and the Civil Aviation Act 2012 regime contain “on the merits” reviews (in the case of the latter regime, on specific grounds only). The Communications Act 2003 regime has been working for a number of years now, and although the statutory scheme might fairly be described as “complex”, recent decisions of the CAT and the Court of Appeal have clarified the procedure considerably: see *British Telecommunications plc v OFCOM (Mobile Call Termination)* [2012] CAT 11 and [2013] EWCA Civ 154; and [2012] CAT 30, dealing with costs). The procedure seems to be working well. As indicated in relation to **Q5**, cases coming before the CAT relating to price controls in the communications sector have generally received speedy determination. The regime under the Civil Aviation Act 2012 is too recent to have been tested.

¹²⁴ The first “tranche” of CMA guidance documents having been issued for consultation on 15 July 2013.

53. Against this background of considerable legislative and institutional change, it may be premature to consider further changes to the standard of review, particularly in an area of profound economic significance to regulated entities.

Q9 What would be the impacts on the length, cost and effectiveness of price control appeals in these sectors if the standard were changed to: (i) judicial review; (ii) focused specified grounds?

54. For the reasons given in answer to **Q1**, **Q2** and **Q8**, it is questionable whether the changes envisaged by the Consultation for price control appeals would result in a more effective regime. The reverse may well be true.

55. In terms of time and cost implications, the answer to **Q3** is repeated.

Q10 Bearing in mind the proposals that the NI Executive has already consulted upon in relation to electricity and gas; to what extent should the changes proposed in this consultation be extended to Northern Ireland?

56. The CAT has nothing to add to its answers to **Q1** to **Q9**.

Q11 What do you think the costs and benefits might be of moving to a direct appeal approach in the rail sector with either (i) a judicial review standard; or (ii) a specified grounds approach?

57. The CAT has nothing to add to its answers to **Q1** to **Q9**.

Q12 Are there any legal or other reasons why other regulatory decisions should be heard on an appeal standard other than judicial review? If so, which decisions and why?

58. The question pre-supposes agreement with the proposition advanced in **Q1**. Please see the answer to **Q1** above.

Q13 What would the impacts be on the length, cost and effectiveness of other regulatory appeals if the standard were changed to: (i) judicial review; (ii) consistent specified grounds?

59. Please refer to the answers to **Q1** and **Q2**. It is questionable whether changes of the kind envisaged would result in a more effective regime. The Consultation contains no evidence to suggest that the regime would be any more effective.

60. In terms of time and cost implications, the answer to **Q3** is repeated.

Q14 Are there any reforms of the CAT's Rules the Government should make to achieve its objectives set out in paragraph 5.9?

61. Please see our comments at Part I, paragraphs 45 to 52 above.

Q15 Do you agree that the relevant Chief Justice should be able to deploy judges at the level of the High Court or their equivalents in Scotland and Northern Ireland to sit as Chairman of the CAT?

62. Yes. See Part I, paragraph 50 above.

Q16 Do you agree that these judicial office holders should not be limited to a term of 8 years? Please include any views you may have concerning the 8 year term limit and CAT chairman that do not hold another judicial office.

63. Yes. The eight year term is difficult to defend in the case of either full-time or fee-paid judicial office holders. Subject to the retirement age applicable to their office, it ought to be possible for appropriately experienced full-time judges to be deployed as CAT Chairmen without further temporal limitation.

64. As regards CAT Chairmen who do not hold full-time judicial office, the eight year limit is equally inappropriate and damaging to the system, and should be abolished. The opportunity should be taken to move to a system of rolling, renewable appointments of, say, five years, of the kind generally applicable throughout the justice system in respect of fee-paid (ie part-time) judges. The current eight year non-renewable limit is unique to CAT judges, as far as we are aware. There is no justification for treating them differently from all other judges. The limit results in the loss to the CAT and its users of a great deal of extremely specialised knowledge and experience. It is wasteful of judicial resources. There is no downside to its repeal. Diversity considerations are fully respected in the appointment process when each CAT Chairman (whether full-time or part-time) is recruited by the Judicial Appointments Commission.

Q17 Do you agree that the CAT should be permitted to sit with a single judge (without panel members)?

65. The CAT is already entitled to sit with the President or a Chairman alone in order to deal with certain matters, notably, interim relief and case management issues.¹²⁵ Subject to the points we make at Part I, paragraph 50 above, we support the extension of this power to certain other cases, such as, for example, where the issues in the case are wholly or mainly questions of law

¹²⁵ See in particular, rule 62 of the 2003 Rules.

or procedure. However, given the invaluable benefit of the CAT's multidisciplinary constitution, we would not support the imposition of a mandatory approach which required the CAT to sit with a Chairman alone in any particular category of case. The CAT should be granted sufficient flexibility to decide, on a case-by-case basis in the light of the particular circumstances, whether the use of this power is appropriate.

Q18 Do you agree that the Competition Commission should continue to hear appeals against price control and licence modification decisions?

66. The CAT makes no comment on this question.

Q19 Do you agree that the process for bringing appeals against price control decisions in the communications sector should be simplified so that these appeals go directly to the Competition Commission? If so, would the Civil Aviation Act 2012 be an appropriate model to follow?

67. Please see our earlier comments, in particular at Part I, paragraphs 34 to 36 above. There may be a case for re-routing the price control aspects of communications appeals directly to the CC/CMA, and there is no reason why the Communications Act 2003 regime could not be altered so as to follow the lines of the Civil Aviation Act 2012 model. However, the latter model is an untested one. Moreover, although the Communications Act 2003 system is undoubtedly complex, its operation over ten years has been clarified by the parties' practice and the case-law that has evolved. The regime works reasonably well. In particular, the fact that all appeals – whether “price control” or “non-price control” are initially referred to the CAT has a number of advantages:

- (1) The CAT, as a judicial body, can identify and resolve any contested issues at the outset of an appeal, for example whether, as a matter of law, a given appeal raises price control issues, whether particular interventions by third parties should be permitted (and if so, on what terms), and whether disclosure is necessary in order for an appellant to advance its case.
- (2) If an appeal raises both price control and non-price control issues, the CAT can consider whether one set of issues should be heard ahead of the other, or whether parallel hearings (in front of both the CAT and the CC) are appropriate, and identify an appropriate procedural timetable.
- (3) The CAT can put in place a confidentiality ring, before proceedings in front of the CC begin.

68. There are also viable means of improving the existing regime for communications price control appeals, short of the institutional reshuffle contemplated in the Consultation. For example, the existing bifurcated regime could be maintained, with the CAT retaining overall responsibility for the disposal of the appeal, but with the reference questions formulated by the parties at the outset of proceedings and sent immediately to the CMA for its determination. At present, the specified price control matters are not agreed, or referred to the CC, until the close of pleadings before the CAT. The appeal process could be considerably shortened if no such pleadings were filed with the CAT, and the parties moved directly, following the reference of the questions, to making submissions to the CC / CMA. However, retaining the role of the CAT in the process would potentially allow contested issues (such as the specific terms of the reference questions, or permission to intervene) to be resolved without delay to the CC / CMA's process.

Q20 Do you agree that the CAT is the most appropriate appeal body to hear appeals against *ex ante* regulatory decisions?

69. The CAT was established as a specialist judicial body with cross-disciplinary expertise in law, economics, business and accountancy, and is therefore well equipped to hear and decide cases involving competition law and related economic regulatory issues.¹²⁶

70. *Ex ante* regulatory decisions often involve very similar (and sometimes identical) issues to *ex post* competition cases. For instance, the question (under, e.g. section 87 of the Communications Act 2003) of whether a “dominant provider” has “significant market power” in an “identified services market”) involves consideration of just the sorts of issue that arise when considering whether the Chapter II prohibition in the Competition Act 1998 has been infringed (notably, market definition and dominance). Further, the CAT has developed significant experience and expertise in the context of its existing jurisdiction over *ex ante* regulatory decisions under the Communications Act 2003.

71. Therefore, it would make sense for the CAT to hear a wider range of appeals or reviews in respect of *ex ante* regulatory decisions in other sectors too.

Q21 Do you agree that Energy Code modification appeals should be heard by the CAT rather than the Competition Commission?

72. There is a case for such appeals to be heard by the CAT, as in undertaking such appeals the CC is, in effect, being required to sit as a tribunal. This though is a question of policy for others.

¹²⁶ The CAT's existing jurisdiction in this area is, in large measure, confined to communications and a limited number of aviation, energy and postal services matters. The statement at paragraph 5.33 of the Consultation that most appeals from *ex ante* decisions (other than price control and licence modification decisions) “are already heard by the CAT” is therefore probably expressed too broadly.

Q22 Do you agree that there should be a single appeal body hearing enforcement appeals?

73. Paragraph 5.37 of the Consultation correctly recognises the desirability of consistency within a sector as well as consistency across sectors. The best way of achieving this would be to put in place a parallel competence on the part of the High Court (or Court of Session/High Court of Northern Ireland) on the one hand and the CAT on the other, with an ability to transfer cases between these courts and the CAT as appropriate.
74. This would achieve a higher degree of consistency across sectors than is presently the case, whilst making use (or continuing to make use) of the expertise of all relevant judicial bodies.
75. A rigid ‘one size fits all’ approach carries a risk of ineffectiveness as it cannot be assumed that regulatory enforcement decisions are *always* “more straightforward legal decisions which require less substantial economic analysis or value judgement” (paragraph 5.35 of the Consultation). Such decisions can raise very complex issues. For instance, the question of whether a regulated entity has complied with a particular SMP condition, for example a condition requiring that prices be oriented to cost, may well involve detailed issues of economics and accountancy.

Q23 Do you think the High Court (or Court of Session in Scotland or High Court of Northern Ireland) or the CAT would be the most appropriate body to hear enforcement appeals?

76. A more flexible approach, such as that suggested by the answer to Q22, may be preferable to the rigid choice posed by Q23.

Q24 Bearing in mind the proposals already agreed by the NI Executive and the legislative process which is underway covering enforcement appeals relating to financial penalties, are there any other further changes required in Northern Ireland?

77. The answers to Q22 and Q23 are repeated.

Q25 Do you agree that there should be a single appeal body hearing dispute resolution appeals?

Q26 Do you think the High Court (or Court of Session in Scotland or High Court of Northern Ireland) or the CAT would be the most appropriate appeal body to hear dispute resolution appeals?

78. We comment on Q25 and Q26 together. Under the Communications Act 2003, OFCOM’s dispute resolution decisions are appealable only to the CAT (with the possibility of a further appeal to the Court of Appeal on points of law). This represents a sensible model which should

be retained in communications cases. The same model would also work well if extended to other sectors. There are two reasons for this:

- (1) First, OFCOM is obliged to determine disputes under the dispute resolution regime extremely quickly. Other than in exceptional circumstances, OFCOM must resolve the dispute within four months (section 188(5) of the Communications Act 2003). It follows from this that any appeal from such a decision also needs to be quickly determined: the CAT has the proven capacity to do this, having speedily heard and resolved many such appeals over the ten years or so since the Communications Act 2003 was enacted. It is far from clear, and has certainly not been demonstrated, that the High Court (and equivalent courts in Scotland and Northern Ireland) would be in a position to achieve the same timescales.
- (2) Secondly, resolving appeals from dispute resolution decisions requires an understanding of the wider regulatory regime. For example, in the field of communications, a dispute resolution determination by OFCOM can engage the question of the particular regulatory duties and powers exercised by OFCOM, or indeed questions of whether an operator has complied with a particular licence condition. Given the potential complexity of such issues, as well as their close relationship with the underlying regulatory regime, it makes sense for a single body with particular regulatory expertise – the CAT – to hear these appeals. Although it is correct (as noted at paragraph 5.40 of the Consultation) that the High Court has significant expertise in hearing commercial disputes, the particular nature of regulatory disputes means that such expertise may not be of such direct relevance or bearing.

Q27 Do you agree that the CAT should have jurisdiction to hear judicial reviews under the Competition Act 1998?

79. This extension of the CAT's competence (whilst, it is assumed, retaining the parallel competences of other courts) would assist the efficient and expeditious disposition of competition appeals, and allow appellants to develop a familiarity with the procedures of a single appeal body. Were such a policy to be determined upon, it could be implemented without difficulty.
80. The existing position, where "process" issues and "substantive" issues are heard by separate bodies (due to only specific categories of appealable decision being identified in section 46 of the Competition Act 1998), can cause appellants and other parties undue cost and delay, and is

inconsistent with the CAT's jurisdiction under other legislation.¹²⁷ For example, one of the parties that appealed the OFT's *Construction* decision was required to lodge appeals in two different fora, the first in the High Court in connection with the procedural fairness of the OFT's "fast track" leniency offer,¹²⁸ and a substantive appeal in the CAT against the penalty ultimately imposed by the OFT.¹²⁹

Q28 Do you agree with the proposal to increase the use of confidentiality rings at the administrative stage of decision-making?

Q29 If so, how do you see such rings operating? Should there be a role for the CAT in supervising them? Who should they be extended to and what sanctions should be available for the breach of such rings?

81. We comment on **Q28** and **Q29** together. The CAT has a well-established regime for the creation and implementation of confidentiality rings, which are a regular feature in the cases that come before it. Whether the use of confidentiality rings can helpfully be extended to the administrative stage is not a matter for the CAT.¹³⁰ Were confidentiality rings so to be extended, then the CAT sees no difficulty in its supervising them, were that considered appropriate.

82. It is unclear whether the availability of confidentiality rings at the administrative phase would have an impact on the overall number of appeals that are brought. However, the availability of confidentiality rings at that earlier stage could increase the speed of appeals, as it would then be less likely that parties would seek permission to amend their pleadings before the CAT in light of information disclosed into a confidentiality ring at the appeal phase (which can delay proceedings). Their advisers would already have been made aware of such information at an earlier juncture.

¹²⁷ The CAT's jurisdiction under section 120 of the Enterprise Act 2002, for example, extends to a "decision...in connection with a reference or possible reference", and has been held to extend to procedural decisions taken by the CC in connection with a reference: *Sports Direct International PLC v Competition Commission* [2009] CAT 32.

¹²⁸ See [2009] EWHC 1875 (Admin).

¹²⁹ See [2011] CAT 10.

¹³⁰ The potential use of confidentiality rings during the administrative phase of a regulator's investigation was highlighted during a recent meeting of the CAT's user group, to which users reacted favourably. See the minutes of the meeting of 8 November 2012, available on the CAT's website:

http://www.catribunal.org.uk/files/1.UserGroup_minutes_08Nov2012.pdf

Q30 Do you agree that the factors that the CAT should take into account in exercising its discretion to admit new evidence in antitrust and Communications Act cases should be set out in statute along the line proposed?

Q31 Do you agree that the approach to new evidence in Schedule 2 to the Civil Aviation Act 2012 should be applied to other price control appeals?

83. **Q30** and **Q31** are dealt with together. A number of remarks have already been made on these questions in Part 1, paragraphs 41 to 44 and 48 above. However, by way of direct response, the CAT would note that the present regime, which allows the CAT to control the evidence before it (including through the exclusion of certain evidence where appropriate) is well-established, has been reviewed and approved by the Court of Appeal, and is understood by parties to CAT proceedings.¹³¹ The case for change is not made out in the Consultation, and the proposed change is unnecessary and undesirable.

84. By way of expansion, the following additional points need to be made:

- (1) The manner in which appeals to the CAT are made was described in Part II, paragraph 34 above. An appellant must state – and state with precision – its grounds of appeal. It is not possible to appeal a decision “generally”: such an appeal would be struck out as improper. It follows that, from the very beginning of an appeal process, the grounds of appeal will be identified and will not (save in exceptional circumstances) change.
- (2) Unless the regulator has reached a decision on grounds that were not canvassed in consultation with interested parties (which has occurred: see, for example, *CTS Eventim AG v Competition Commission* [2010] CAT 7), it is very likely that at least the substance of the grounds of appeal will have been articulated before the regulator, but not accepted by it. (Any suggestion that parties are purposely holding back evidence until the appeal stage would be entirely without foundation, and no such suggestion is made – see paragraph 3.23 of the Consultation.)
- (3) It is important to be clear as to what is meant by “new” evidence. It is true that grounds of appeal will be supported by statements and documents evidencing the specific points being made. However, such material simply involves highlighting and explaining to the CAT the points at issue, and their context. It is “old” evidence in “new” packaging, and to make it subject to an exclusionary regime would be wholly inappropriate and counter-

¹³¹ The CAT has also provided guidance in its judgments regarding the manner in which competition authorities and regulators gather and marshal evidence during investigations, with a view to possible appeals: see, for example, *Tesco Stores Ltd & Ors v OFT* [2012] CAT 31 at [115]-[131].

productive. The reference (at paragraphs 3.22 and 7.16 of the Consultation) to the substantial evidence advanced in the *Pay TV* appeals¹³² is inapposite, as the CAT reached its view on the grounds of appeal disputing the factual basis of the “competition problem” in question primarily by reference to the evidence which was before OFCOM at the time it took its decision.

- (4) It is assumed that the reference to “new” evidence in **Q30** is intended to refer to evidence supporting points that were *not* made before the regulator. This can happen, but actually happens extremely rarely. The rules were considered in *British Telecommunications plc v OFCOM* [2010] CAT 17 (before the CAT) and [2011] EWCA Civ 245 (before the Court of Appeal). The Court of Appeal made clear (see [57]*ff*) that the CAT retained a broad discretion to admit new evidence, not least because – although these are nominally “appeals” – they are actually the *first time* very important regulatory decisions are the subject of *judicial* scrutiny.
- (5) In its own judgment in that case, the CAT specifically addressed OFCOM’s concerns regarding a broad discretion to admit evidence (at [81]), which it considered were unfounded (at [82] to [86]). As noted, this decision was affirmed on appeal. It is worth bearing in mind the circumstances that gave rise to the application to admit new evidence in the case. Essentially, in a series of communications to BT – the party seeking to admit new evidence – OFCOM misstated the ambit of its own investigation (see [103] to [108]), with the result that BT was unaware until a very late stage of precisely what evidence it needed to adduce.

85. A closed list of instances where “new” evidence can or cannot be adduced will give rise to disputes as whether particular evidence does, or does not, fall within the list, and (inevitably) cannot make provision for the unanticipated case. This will almost certainly lead to additional and longer hearings and to further appeals to the Court of Appeal from the CAT’s exclusion or admission of evidence by reference to the proposed statutory criteria. The regime under the Civil Aviation Act 2012 is recently introduced and is untested: before adopting it as a model, the practical operation of this regime ought to be considered.

86. Further, the existing procedural rules are perfectly adequate to enable the CAT to control (and where appropriate limit) the evidence before it, and the CAT does already take such steps. For example:

¹³² The *Conditional Access Modules* case (1179/8/3/11) was, in fact, a satellite appeal to four main appeals brought against OFCOM’s *Pay TV* statement (cases 1156-1159/8/3/10), although the evidence in those cases was heard together.

- (1) In case 1185/6/8/11 *BAA Limited v Competition Commission*, the CAT refused BAA permission to adduce expert evidence in relation to the costs of divesting Stansted airport, concluding that this evidence was not necessary to understand the submissions being made by BAA and that evidence of this type was not appropriate in the context of the proceedings in question. As the CAT noted at [80] of its judgment ([2012] CAT 3):

“...In our view, attempts to introduce detailed technical expert evidence in reviews under section 179 of the Act should be strongly discouraged and disallowed other than in very clear cases. Otherwise, there is an obvious danger that costs will be wastefully multiplied with no significant benefit for the speedy and efficient dispute resolution procedure which is supposed to be provided for by a section 179 review, as with judicial review generally...”

- (2) In the current appeals from OFCOM’s recent *Ethernets* determination¹³³ (merits appeals under section 192 of the Communications Act 2003 in relation to an OFCOM dispute resolution determination), the CAT refused the appellants permission to advance an expert report in relation to types and rates of interest, on the basis that this was an issue with which courts were already familiar, and the point could in any event be addressed by another expert witness.¹³⁴
- (3) In the recent *Mobile Call Termination* appeals,¹³⁵ the CAT (upheld by the Court of Appeal¹³⁶) expressed scepticism about whether, in the context of a price control determination, new evidence would be admitted late in circumstances where a party had had the opportunity to tender such evidence at an earlier juncture. The CAT described such a party as the “author of its own misfortune”.

Q32 Do you agree that when successful the regulator should be awarded its costs unless the regulator’s conduct can be characterised as being unreasonable or there are exceptional circumstances; and that when unsuccessful, costs should not be awarded against it unless the regulator’s conduct can be characterised as having been unreasonable, unless there are exceptional circumstances?

87. We refer to earlier comments in the Introduction and Summary, at paragraph 4(7), and also in Part I, paragraph 8 above. We now expand on these points here. Costs orders during and at the end of litigation represent an important, just and effective way of ensuring that appeals are responsibly conducted. They also reinforce the just disposal of appeals by allocating some of the costs of mounting or defending them so as fairly to reflect the outcome, where that is appropriate. Litigation – including appeals before the CAT – comes in all shapes and sizes, and

¹³³ Cases 1205-1207/3/3/13.

¹³⁴ See the transcript of the case management conference on 18 March 2013 at page 14ff.

¹³⁵ *British Telecommunications Plc v OFCOM (Mobile Call Termination)* [2012] CAT 11, at [224]-[228].

it is important for the CAT to be able to be flexible in the costs orders it can impose, rather than strait-jacketed. The present regime is characterised by a wide discretion in the CAT, which has been developed in the case-law and acknowledged by the Court of Appeal.¹³⁷ It is an approach that should be retained.

88. It is not appropriate, in this answer to **Q32**, to set out in detail the sorts of orders the CAT typically makes. In very general terms, the CAT's starting point is that the "loser pays" and this principle tends to be applied whether the loser is a regulator or a privately funded party. This, however, is only the starting point, and may be adjusted by reference to an open list of relevant considerations. For example:

- (1) The CAT may take an "issues" based approach, and allow the winner on certain issues to recover costs (even though the overall appeal was lost) or preclude the winner from recovering costs on certain issues.
- (2) The CAT may consider the size of the litigation team instructed by the winner, and prevent the winner recovering a portion of its costs where the team is unnecessarily large or an unreasonable number of hours have been claimed.
- (3) The CAT may take into account the way in which issues have been contested, and penalise in costs a party that has put the other parties to unnecessary trouble and expense.
- (4) The CAT can already take into account, as a relevant factor to an award of costs, the position and duties of a regulator, together with the extent of any risk that an order for costs might have a chilling effect on their activities. As it noted in its ruling on costs in the *Pay TV* appeals:¹³⁸

"...it is certainly a relevant consideration whether and if so to what extent in any particular case the possibility of a substantial award of costs is likely to have a chilling effect on OFCOM doing what it considers to be appropriate in the exercise of its statutory duties. However, whatever the position may have been in the infancy of the current regulatory regime, we are not persuaded that the risk that a mature and responsible regulator such as OFCOM would be deflected by that consideration is of itself so substantial as to justify accepting as a general principle that an adverse order for costs should not be made against OFCOM in section 192 appeals."

89. In short, a nuanced, case-by-case, approach is called for. Such an approach should not – in general terms – be "asymmetric" in favouring regulators over the regulated, save perhaps in

¹³⁶ [2013] EWCA Civ 154, at [60]-[62].

¹³⁷ *Quarmby Construction Company Limited v OFT* [2012] EWCA Civ 1552.

¹³⁸ *British Sky Broadcasting Limited & Ors v OFCOM* [2013] CAT 9, at [15].

very specific, probably unique, cases of dispute resolution appeals.¹³⁹ These cases, however, are capable of being (and are in fact) dealt with under the CAT's general discretion, without the need for a legislative change to the CAT's rules.

90. As the Impact Assessment accompanying the Consultation makes clear, the costs of appeals falls most heavily on appellants,¹⁴⁰ yet the proposal in the Consultation would significantly favour regulators. An asymmetric approach of the kind discussed in the Consultation risks unfairly deterring SMEs from appealing regulatory decisions, even if they are wrong. An SME is – in the case of such a regime – deterred from appealing even a strong case because it will appreciate that, save in the most extreme of cases, it not only risks paying the regulator's costs if it loses, but that even if it wins, it will still have to bear its own costs of establishing that the decision was wrong. A number of the appellants against the OFT's *Construction* decisions were SMEs with a very low turnover and (in some cases) negligible profitability. Had these firms been precluded from seeking costs from the OFT, notwithstanding a successful appeal against the level of penalty imposed, it is very likely that they would have been deterred from bringing an appeal. The Consultation should not lose sight of its stated objective “to ensure access to justice is available to all firms and affected parties”.¹⁴¹
91. The Consultation does not identify any convincing reasons why one side in a dispute (but not the other side) should be afforded special protection in terms of its liability for the opposing party's costs, should the opponent be successful. Such asymmetry would be unfair and at odds with the well-established approach under the CPR in High Court challenges to administrative decisions.¹⁴² There would also be a risk that insulating regulators from potential liability for an appellant's costs of challenging an incorrect or unlawful administrative decision would endanger the quality of such decisions and of the decision-making process.

¹³⁹ *Ibid*, at [30], where the CAT noted that dispute resolution decisions have been described by OFCOM as involving the performance of a “unique quasi-judicial” function, and that the “special nature of such decisions might be said to affect the appropriate starting point for the award of costs on an appeal therefrom.”

¹⁴⁰ See fn 14 above.

¹⁴¹ See Consultation para 4.14.

¹⁴² See CPR Part 44.2(2)(a), and the CAT's ruling on costs in *Tesco PLC v Competition Commission* [2009] CAT 26 at [32].

Q33 Do you agree regulators should be encouraged to claim their full costs, including internal legal costs?

92. A properly effective costs regime implies that each party seeks to claim its reasonable costs. In the case of regulators, there appears to be no good reason why internal costs cannot be claimed: see *British Telecommunications plc v OFCOM (Mobile Call Termination)* [2012] CAT 30 at [39].

Q34 Do you agree that the administrative bodies should be more active in scrutinising appeal grounds and should where appropriate challenge them at the CAT at an early stage?

Q35 Do you agree that the CAT [should] review appeals to identify and in appropriate cases reject those appeals or aspects of an appeal which stand little chance of success?

93. **Q34** and **Q35** are dealt with together. Please see our comments at Part I, paragraphs 38 to 40 above. Clearly, where a ground of appeal is capable of being dealt with summarily and without a substantive hearing that course should be followed – whether on the application of the regulator or by the CAT of its own motion. The CAT’s rules of procedure already make provision for this,¹⁴³ such that no amendment is necessary. In practice both sides in regulatory appeals are almost invariably represented by highly experienced specialist advisers, who are likely to have been intimately involved in the underlying dispute for a considerable period before the matter reaches the CAT. Where an appeal (or indeed a defence) stands no realistic prospect of success, it is to be anticipated that an application would be made by one of the parties, seeking a “strike out” at an early stage. Little would be gained by imposing a specific obligation on the CAT to conduct an early detailed review of the merits of each appeal (and defence) when lodged, as the CAT’s familiarity with the issues at that stage is obviously less than that of the parties and their advisers. On the other hand, where one side (invariably the appellant) is not legally represented, or does not appear to be represented by advisers who are experienced in the relevant area of law, the CAT is likely to consider it appropriate to conduct a more detailed review of the merits at an early stage.

94. However, **Q34** and **Q35** imply that there are many grounds of appeal (or many appeals) that can be characterised as so weak as to justify this course: there is no evidence to justify that implication, and in the CAT’s experience it is not well-founded.

¹⁴³ Rule 10 of the 2003 Rules.

Q36 Do you consider that the principles proposed for decision-making in anti-trust [cases] should be applied in any way to regulatory decision-making?

Q37 Are there other ways in which regulators could consult more effectively and transparently at an earlier stage, and could such moves be expected to reduce the number of appeals?

Q38 Do the regulators need more investigatory powers, such as a power to ask questions?

95. Q36, Q37 and Q38 are principally directed at the regulators, and the CAT makes no comments.

Q39 Do you have any views on whether non-infringement decisions should continue to be appealable decisions? Why do you take that view?

96. Now that the distinction between non-infringement decisions and decisions not to proceed with an investigation for other reasons, for example in the light of other priorities of the enforcement authority, has been clarified by the CAT's case law, there is no particular problem in this area. However, in the light of the Government's intention to enlarge the CAT's jurisdiction in private enforcement so as to include "stand alone" actions for infringement of the competition prohibitions, it could be argued that there is less utility in a complainant's ability to appeal against a non-infringement decision.

Q40 Do you agree with the proposal that straightforward cases heard by the CAT should have a target time of 6 months, instead of the existing 9 months?

Q41 Do you agree with the proposal to introduce target times for all other regulatory appeals heard at the CAT of 12 months?

Q42 Do you agree with the proposal to provide the CAT with the power to limit the amount of evidence and expert witnesses, including in public law cases?

Q43 What are your views on a voluntary fast-track procedure where parties themselves agree to limit the amount of evidence including from witnesses, and potentially capping costs?

Q44 Do you agree with the proposal to amend the time limit for price control appeals in the communications sector to 6 months with the possibility of a 2 month extension?

Q45 If so, do you agree with the proposal to use the Civil Aviation Act 2012 as a model to ensure [the] Competition Commission has the relevant case management powers?

Q46 Do you agree with the proposal to reduce the extension available for regulatory references in the water, rail and aviation sectors (Transport Act 2000) from 6 months to 2 months?

Q47 Could the CAT's and/or the Competition Commission's case management procedures be improved and, if so, how?

97. Please see our comments at Part I, paragraphs 45 to 52 above. The CAT is conscious that appeals must be handled as quickly as the requirements of justice permit. The statistics measuring the length of time that appeals take before the CAT demonstrate a high degree of success in this regard.
98. The imposition of additional time limits or “target times” is unlikely to be helpful. Cases take as long as they do for reasons that (in general) have little to do with the CAT, and more to do with the needs of the parties appearing before the CAT. This is not in any way a criticism, but reflects the fact that, in the run-up to a trial, the vast majority of the preparatory work (in terms of preparation of pleadings, evidence, and written and oral submissions/cross-examination) is done by the parties, and the time-frame in which this work must be done cannot be unduly constrained, if a fair trial is not to be compromised.
99. In contrast to many other courts, the CAT has the great advantage of extremely flexible, efficient and cost-effective panels consisting of chairman and ordinary members. The panel of chairmen comprises a number of part-time judicial office holders as well as a number of High Court judges of the Chancery Division. When there are fewer appeals to the CAT, the part-time chairmen do their other work (most are experienced QCs at the Bar) and the Chancery judges are engaged in their day to day work of the Chancery Division. In busy times, the Registrar of the CAT can call on all these personnel to assist. It is extremely rare for the CAT to be unable to accommodate hearings at whatever pace the parties wish, and the CAT is usually able to proceed at a pace quicker than the parties would wish or can reasonably achieve. In practice the CAT case-manages, hears and finally determines each and every case as expeditiously as is consistent with the demands of justice and the competing requirements of other cases which may be more urgent.
100. In these circumstances, the imposition of additional “targets” is certainly unnecessary, and probably unhelpful. In particular, a distinction between “straightforward” and “not straightforward” cases seems designed to create argument, rather than speedy resolution. Further, although the CAT may be able, following the conclusion of the main hearing in a particular case, to provide an indication to the parties of the likely period in which it will deliver its decision, the suggestion (at paragraph 7.14 of the Consultation) that the CAT indicate the date of its decision at the first case management conference is wholly unworkable. Usually, by the time of the case management conference, the CAT has only received a single document, namely the notice of appeal, and will have no proper way of anticipating (particularly without sight of the respondent's defence) the likely length and complexity of the proceedings, or the

length of time likely to be required to prepare a judgment that fairly and fully addresses the arguments in the case. As far as monitoring data is concerned (paragraph 7.13 of the Consultation), the CAT already makes a vast amount of information in relation to its proceedings available on its website, and in its annual review and accounts for each year.¹⁴⁴ This latter document provides detailed case statistics for all CAT proceedings during the period under review.

101. As to the CAT's powers to regulate its own procedure – including as regards factual and expert witnesses and the volume of evidence – the CAT has entirely adequate and appropriate powers¹⁴⁵ and regularly exercises them. Please also refer to the comments at Part II, paragraph 86 above.
102. Paragraph 7.18 of the Consultation suggests that there should be a presumption that matters be resolved “on the papers” (ie without an oral hearing) wherever possible, and that oral hearings be kept to an absolute minimum to minimise the length and costs of appeals for all parties. This is consistent with the CAT's existing practice – the CAT already routinely decides issues on the papers, including the question of costs and permission to appeal. However, this is again an area where retaining flexibility is key: reducing a disputed issue so that it can be dealt with on the papers without a hearing takes the parties time and may increase costs for them in a particular case. (For example, deciding issues of costs and permission to appeal is undoubtedly slower and more expensive than having a short hearing on these points immediately following the handing down of judgment.) As far as the length of oral hearings is concerned, the CAT's existing practice is already to ensure that oral argument is limited to that which is strictly necessary and conducted as efficiently as possible. In this regard, the CAT's Guide to Proceedings provides as follows:

“The structure of the main oral hearings of the Tribunal will be planned in advance, in consultation with the parties, with a view to avoiding lengthy oral argument. Since the written arguments of the parties will have already been fully set out, and since the main issues will have been identified prior to the main oral hearing, this hearing will normally be conducted within short defined time limits, in accordance with established practice in the [General Court].”¹⁴⁶

¹⁴⁴ <http://www.catribunal.org.uk/248/Publications.html>

¹⁴⁵ See, for example, rules 19 to 22 of the 2003 Rules.

¹⁴⁶ Para 3.4.

However, the importance and usefulness of oral argument in appeals should not be underestimated. As Laws LJ noted in the case of *Sengupta v Holmes* [2002] EWCA Civ 1104, at [37]:

“...oral argument is perhaps the most powerful force there is, in our legal process, to promote a change of mind by a judge. That judges in fact change their minds under the influence of oral argument is not an arcane feature of the system; it is at the centre of it.”

Q48 Are there any other measures Government or others could take to achieve robust decisions more swiftly?

103. The CAT has nothing further to add in response to this question.

Comments on the Consultation Annexes

104. The CAT makes the following observations in relation to the Annexes to the Consultation:

- (1) **Annex B:** the list of current functions of the CAT set out in this Annex is not comprehensive, and draws only on the high level summary set out on the CAT’s own website. By way of example, the areas of jurisdiction conferred on the CAT by the Energy Act 2010, Postal Services Act 2011 and Civil Aviation Act 2012 are not mentioned.
- (2) **Annex D, Table D2 (average length of CAT cases):** the comments at Part II, paragraph 4(2) above are repeated in relation to the presentation of statistics in the Consultation generally. In particular the figures in this table D2 are not recognised, as they appear to include appeals outside the CAT’s jurisdiction. For example, the CAT has no jurisdiction in respect of licence modification decisions.¹⁴⁷ Further, it is not clear what is included within “other JR”, given that the only cases in the period in respect of which the CAT has exercised a judicial review jurisdiction are cases connected with merger and market investigation references (under sections 120 and 179, Enterprise Act 2002) or specified price control matters (under section 193(7), Communications Act 2003). Yet each of these categories appears to be referenced elsewhere. It is also not clear which cases are referred to within the category of “ex ante regulation”.
- (3) **Annex D, Table D3 (Communications appeals):** the list of communications appeals, and the accompanying figure showing the length of different stages of appeals, is

¹⁴⁷ Para 66 of the Impact Assessment accompanying the Consultation is therefore wrong in its statement that “the CAT hears all licence modification appeals in the communications sectors.”

incomplete and inaccurate. Further, no attempt is made to represent the impact of interlocutory appeals (as in case 1151/3/3/10), preliminary issues hearings (as in case 1146/3/3/09) or the time taken up, in several of these cases, with the CC's determination of the specified price control matters arising in the appeal.

(4) **Annex E (Case studies):** this section of the Consultation is cursory, difficult to understand in places, and contains several inaccuracies. No explanation is provided for the selection of the five cases at pages 93 to 96, which – insofar as many of them have particular exceptional characteristics – do not provide a good sample of typical cases before the CAT. They do not tell the reader anything useful about either competition or communications appeals. Nor is there any analysis of these particular cases in the main body of the Consultation. In particular:

(i) **Case 1117/1/1/09** (*G F Tomlinson Building Limited & Or v OFT*) – this case is exceptional insofar as it was managed together with 24 other appeals against the same OFT composite decision. Although, as noted, each appeal was heard separately, given the common issues between the appeals, the CAT delivered about ten substantive judgments, many of which dealt with more than a single case at the same time (see [2011] CAT 7, which disposed of six appeals in a single judgment of 83 pages). Consequently, although an overall length of appeal is stated as 1 year, 4 months and 6 days, it should be recalled that the CAT disposed of all 25 separate appeals within this broad timeframe. Contrary to what is stated in the Consultation:

(a) G F Tomlinson's appeal was not heard, as stated, over 2, 5 and 6 July 2010, but was heard in half a day on 6 July 2010.

(b) Limited evidence was advanced by the appellant in this case, as it challenged only the penalty imposed by the OFT, and that evidence was directed specifically at the impact of the penalty on the appellant. No oral evidence was heard.

(ii) **Case 1099/1/2/08** (*National Grid PLC v GEMA*) – it should first be noted that the stated length of appeal (2 years, 3 months) includes not only the appeal before the CAT, but the subsequent appeals to the Court of Appeal and Supreme Court. As noted, the CAT's own judgment was handed down within a period of just over one year from the registration of the appeal. This was a detailed and complex appeal (the notice of appeal ran to over 300 pages), involving evidence from 13 witnesses of fact and 5 expert witnesses and, in its ruling on costs, the CAT

penalised National Grid for the “lack of clarity” in its case, and for pursuing points which were unmeritorious.¹⁴⁸ However, the CAT noted (at paragraph 33 of its judgment)¹⁴⁹ the particular importance of the case, which related not only to past abusive conduct, but to an ongoing 14 year glidepath which was likely to have an important impact on the development of competition in the relevant market. The CAT was ultimately able to dispose of the appeal in a judgment of 86 pages, which was handed down a little over three months from the hearing.

- (iii) **Case 1102/3/3/08** (*T-Mobile (UK) Limited v OFCOM*) – see our comments at Part II, paragraphs 28 to 32 above.
- (iv) **Case 1111/3/3/09** (*The Carphone Warehouse Group Plc v OFCOM*) – the summary of this case wrongly suggests that the CAT delivered two judgments, one concerning non-price control matters, and another concerning the price control matters. This is not accurate: the CAT did not make **any** judgment on the substance of the appeal. Rather, the non-price control matters were subject to a settlement between the parties (pursuant to rule 57 of the 2003 Rules). As far as the price control matters were concerned, none of the parties brought a judicial review challenge to the CC’s determination, such that the CAT allowed the appeal in accordance with that determination. Accordingly, the case spent just 5.57 months before the CAT (during which the parties filed their pleadings), with 9.13 months being accounted for by the CC’s determination of the specified price control matters.
- (v) **Cases 1046/2/4/04 and 1166/5/7/10** (*Albion Water Limited & Or v WSRA; Albion Water Limited v Dŵr Cymru Cyfyngedig*) – the circumstances of these cases are truly exceptional, not least because of the detailed issues of law and economics involved, but due to the fact that the CAT upheld Albion Water’s challenge to two successive non-infringement decisions of OFWAT, such that the CAT was required to reach its own decision (in exercise of its powers under paragraph 2(d) and (e) of Schedule 8 to the Competition Act 1998) on the question of infringement on both occasions. Further, a large part of the process was accounted for by the period taken by OFWAT to reach a new decision on the question of whether the first access price was excessive. Despite the title of “Case study 5”, no mention is made of the second case, namely the subsequent successful damages action brought by Albion Water.

¹⁴⁸ [2009] CAT 24 at [12]-[13].

- (5) **Annex F (International Appeals Process):** It is not clear what cases are referred to in the two columns titled “Competition Appeals [sic] Tribunal – Energy (1)” and “BIS – Competition Appeals Tribunal – Energy (3)”, as the CAT is not aware (other than the *National Grid* case referred to at Part II, paragraph 104(4)(ii) above) of any regulatory decisions appealed to the CAT in the energy sector (and *National Grid* is better described as an *ex post* competition enforcement case).
- (6) **Annex H (Details of Hearing Body and Standard of Review by Sector):** this table appears to be incomplete and inaccurate in places. For example, the column titled “enforcement action for breach of the transmission constraint licence condition” does not accurately reflect the CAT’s jurisdiction under the Electricity Act 1989 (as amended by the Energy Act 2010). Further the description of the “standards of appeal” in relation to Competition Act 1998 investigations by Ofgem is incomplete. Other than in respect of Ofgem, there is no mention of the other regulators’ concurrent powers.

¹⁴⁹ [2009] CAT 14.